17165
116

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 305.

ENNIS WATER WORKS, PLAINTIFF IN ERROR,

vs.

CITY OF ENNIS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF TEXAS.

FILED JULY 17, 1912.

(23,300)

(23,300)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 305.

ENNIS WATER WORKS, PLAINTIFF IN ERROR,

vs.

CITY OF ENNIS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF TEXAS.

INDEX.

	Original.	Print
Transcript from the district court for the county of Ellis, State of Texas	1	1
Caption	1	1
Plaintiff's first amended original petition	1	1
Defendant's first amended original answer	22	13
Plaintiff's first supplemental petition	35	20
Orders of court: Demand for jury and leave to amend	39	23
Conclusions of fact and law	40	23
Judgment	47	27
Appeal bond	52	30
Assignment of errors	58	34
Bill of costs	60	35
Certificate of clerk district court	61	37
Proceedings in the court of civil appeals	62	37
Opinion	62	37
Judgment	76	46
Motion for rehearing	76	47
Order overruling motion for rehearing	78	48
Proceedings in the supreme court of Texas	79	48
Application for writ of error	79	48
Order granting application for writ of error	84	52

JUDD & DETWEILER (INC.). PRINTERS, WASHINGTON, D. C., FEBRUARY 9, 1914.

	Original.	Print
Citation	84	52
Order of submission	85	53
Opinion	85	53
Judgment	107	66
Motion for rehearing	107	66
Precept and return	109	67
Order overruling motion for rehearing	111	68
Petition for writ of error	112	68
Writ of error bond	117	71
Writ of error (original)	119	72
Citation in error (original), with acceptance of service	121	74
Assignment of errors	122	75
Certificate of clerk of the supreme court of Texas	124	76

1 *Caption.*

STATE OF TEXAS,
County of Ellis:

At a term of the District Court, began and holden at Waxahachie, within and for the County of Ellis, before the Hon. F. L. Hawkins, and ending on the 21st. day of May, A. D. 1910, the following case came on for trial, to-wit:

No. 7656.

CITY OF ENNIS
versus
ENNIS WATER WORKS.

Plaintiff's 1st Amended Original Petition.

In District Court, Ellis County, Texas, February Term, 1910.

No. 7656.

CITY OF ENNIS
vs.
ENNIS WATER WORKS et al.

With leave of the Court first had and obtained, now comes the City of Ennis, a municipal corporation, duly incorporated under and by virtue of the general laws of the State of Texas relating to municipal corporations, and located in Ellis County, Texas, and files this, its first amended original Petition, in lieu of its original petition filed herein on May 19th, 1909, and complaining of Ennis Water Works, a corporation duly incorporated, having its principal office in the City of Ennis, in Ellis County, Texas, and of A. M. Morrison, a resident citizen of said County and State, and for cause of action your petitioner alleges:

I.

That long prior to March 19, 1900, your petitioner was incorporated under the general laws of the State of Texas, relating to Cities and towns, and on and prior to that date was exercising its corporate functions in the territorial area authorized by its act of incorporation, and that on that date it had, and still has, a
2 population exceeding five thousand inhabitants, and a corporate area of several square miles; that within its limits are the lines of two systems of railway, viz: the Houston and Texas Central Railway Company and the Texas Midland Railway Company, and divers cotton gins, an oil mill, divers banks, mercantile establishments, homes, hotels and other institutions, and that it had

the power, and it was its duty, at that time and at all times since, to exercise the functions pertaining to it under the laws of Texas.

II.

That among other powers conferred and duties imposed upon plaintiff was that of providing a suitable water supply for drinking, domestic, manufacturing and industrial purposes: that on said date, and at all times since, it owned and was in possession of, as part of its water system, two large reservoir sites and lakes of impounded water, together with the lands pertaining thereto, which property will be hereinafter referred to as the "new lake" and "the old lake", and is more particularly described and set forth in the ordinance hereinafter set out; in that it also owned and still owns about 8,000 feet of valuable cast iron, 8 inch water mains, which pipe was laid to and still connects the new lake with the distribution system of said City; that the old lake reservoir is of the value of $12,500, the new lake of the value of $17,500, and the cast iron pipe laid is of the value of $5,000.

That on said date the Cities water supply was being taken from such reservoirs, through a distribution system owned by A. M. Morrison and the divers railways, cotton gins, oil Mill, business houses, residences and other institutions of said City were being, likewise, supplied from such reservoirs.)

3 III.

(That on March 19, 1900, the then City Council of the City of Ennis,) (without lawful authority so to do.) by ordinance of that date hereinafter set out, authorized its Mayor and City Secretary to execute an alleged contract with the defendant, A. M. Morrison, and that thereafter, on March 22, 1900, its said Mayor and City Secretary, without lawful authority, did execute such alleged contract with said defendant, A. M. Morrison, as follows, viz:

STATE OF TEXAS,
County of Ellis:

Know all men by these presents: That

Whereas, on the 19th. day of March, A. D. 1900, the City Council of the City of Ennis passed and adopted the ordinance which is hereinafter set out and made a part of this contract; and

Whereas, in said ordinance it is provided that the said ordinance shall be a contract by and between the City of Ennis and A. M. Morrison, his heirs, successors and assigns, and shall be binding upon both parties thereto, provided said A. M. Morrison shall file with the City Secretary his acceptance of the same in writing within ten days after the adoption of said ordinance; and,

Whereas the Mayor and City Secretary of said City of Ennis are by the terms of said ordinance authorized and directed to sign and acknowledge such paper or papers as may be necessary to bear out any and all parts of said ordinance; and,

Whereas the said A. M. Morrison has, in writing, accepted the terms of said ordinance, and filed his said acceptance with the City Secretary as provided in said ordinance;

Now therefore, the said City of Ennis, acting through its Mayor, C. B. Lewis, and its Secretary, C. M. Banner, in consideration of the act and things stipulated to be done and performed by
4 the said A. M. Morrison, as set forth and shown in said ordinance hereby binds and obligates itself to in all things carry out and perform the terms and conditions of the said ordinance;

And the said A. M. Morrison, for himself, his heirs, successors and assigns, for and in consideration of the rights, privileges and powers granted to him in said ordinance by said City, binds and obligates himself to fully carry out and perform in all things, the terms and conditions set out in said ordinance as incumbent upon him.

The said ordinance and the said acceptance, above referred to and called for, are in words and figures substantially as follows, to-wit:

Be it ordained by the City Council of the City of Ennis, Texas, that,

SEC. 1. The said City of Ennis does hereby give and grant unto A. M. Morrison, a Citizen of the City of Ennis, Texas, his heirs and assigns, for the term of thirty years from the date of the adoption of this ordinance the right and privilege to supply the City of Ennis, and the inhabitants thereof (and of the territory adjacent thereto) with water for domestic and other uses and for preventing and extinguishing fires.

SEC. 2. The said A. M. Morrison, his heirs or assigns, is hereby authorized and empowered to establish, construct, maintain and operate a system of water works in or adjacent to the City of Ennis, to receive, take and store, conduct and distribute water through said City and adjacent territory; to construct and extend mains and pipes through all the streets, alleys, public grounds and all places under the control of said City of Ennis, and we hereby ratify and approve the location of all machinery mains and pipes now laid or in use; to erect and maintain all engines, machinery and all other
5 appliances necessary for the proper conduct of said water works and for supplying said City and the inhabitants thereof, and of adjacent territory, with water for domestic, manufacturing, extinguishing fires and other purposes.

SEC. 3. Said A. M. Morrison shall have the right and is hereby granted the privilege to take up all pavements and sidewalks, streets, alleys, lanes or public groves or places and make such excavations therein as may be necessary to lay, repair and maintain pipes below the surface of the ground for conveying and distributing water as aforesaid; provided, however, that said Morrison shall within a reasonable time replace, repair all such pavements and sidewalks and other property, making them in as good condition as they were before or as nearly so as practicable.

SEC. 4. The City of Ennis hereby contracts with the said A. M. Morrison, his heirs and assigns, and agrees to rent and does rent of him thirty five (35) double-nozzle fire hydrants, as the same are now located for extinguishing fires, at a rental of Twelve Hundred

($1200.00) Dollars per annum payable monthly in advance; and the City Council for the purpose of providing for the payment of all such hydrant rental shall levy, collect and appropriate annually a sufficient sum of money to cover the amount to become due under this contract.

SEC. 5. At any time the City Council shall direct, said A. M. Morrison, his heirs or assigns, shall make extensions to the mains provided that the amount of such extension shall not exceed two thousand (2,000) feet per annum unless said Morrison, his heirs or assigns, shall consent thereto; and provided further that a double nozzle and steamer connection fire hydrant shall be located on every 1,000 feet of such extension, for which hydrants the City of Ennis
Contracts and agrees with said Morrison, his heirs and assigns
6 to pay him a rental of Forty ($40.00) Dollars each per annum, payable in the manner, at the same time and by the means provided in the preceding section.

SEC. 6. The said Water works system shall be maintained in good and efficient working order during the term of this contract, and a pressure shall always be maintained in the mains equal to the pressure which results from eighty feet (80) of water in the standpipe, unless prevented by unavoidable causes; and it is further agreed that the pumping capacity shall be increased from time to time to meet the growth and demand of the City of Ennis.

SEC. 7. The City of Ennis hereby grants to the said A. M. Morrison, his heirs or assigns the right and privilege to take all the water that may be required for the purposes above enumerated from the reservoirs or lake situated as follows:

(1.) The reservoir known as the "old Lake" situated North West of the City of Ennis, Texas, being a part of the I. D. Sheppard survey and adjoining a certain 73-3/10 acre tract of land owned by the H. & T. C. R. R. Co.

(2.) The reservoir known as the "New Lake" also situated North West of the City of Ennis, and being on the same tract of land contracted for by the City of Ennis from Mark Latimeron the 17th. day of January, 1895, to deed to which reference is here made for a fuller description;

Together with the right of way through all the grounds adjacent to said lakes and owned by the City, subject to the contracts heretofore entered into by and between the City of Ennis and the Houston and Texas Central Railroad Company with reference to the use of water by the said Railroad Company out of said lakes.

The further privilege is granted to the said Morrison, his heirs and assigns to enter in and upon said tracts of land upon which said reservoirs are situated and to erect thereon machinery and improvements necessary for the conducting of said water business.

7 SEC. 8. The City of Ennis in consideration of the sum of Fifty ($50.00) per month payable to it on the first day of each month in advance hereby lets and leases to the said A. M. Morrison his heirs and assigns, during the term of this contract about 8,000 feet of 8-inch water main belonging to the said City of Ennis

and laid by it from the pumping station at said New Lake to a junction with his mains near the standpipe.

SEC. 9. The said A. M. Morrison shall furnish water to the citizens of Ennis at a rate not to exceed the average of water rates of Cities in Texas of population approximately the size of Ennis.

SEC. 10. The City of Ennis reserves to itself the right to acquire by purchase and become the sole owner of said water works system at the expiration of five years, or in periods of five years thereafter upon giving twelve months' notice of such intention and upon paying therefor to the owners thereof the value of said property at the time of said purchase. Franchise having been given without consideration not to be valued in this appraisement. And such value shall be ascertained by appraisement, each party to select a disinterested and competent person for that purpose, and if the said appraisers fail to agree they shall select an umpire to act with them, which said umpire shall pass upon the points of disagreement between the two said appraisers.

SEC. 11. Any person or persons who shall willfully or maliciously injure or destroy any portion of the works, fixtures, or other property belonging to or appertaining to said works or constituting a part thereof, or shall wrongfully interfere with or open any hy-
8 drants or waste any water therefrom, or shall take any water from any public or private hydrant, faucet or fixtures without the consent of the owners of said water works or shall in any way pollute the water supply shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than one dollar nor more than one hundred dollars and costs of prosecution.

SEC. 12. The said A. M. Morrison shall commence the extension of said water works system within four months from the adoption of said ordinance and shall complete the same to the extent of at least two thousand feet within six months thereafter.

SEC. 13. This ordinance shall be a contract by and between the City of Ennis, Texas, and the said A. M. Morrison, his heirs, successors and assigns, and shall be binding upon both parties hereto, provided the said A. M. Morrison shall file with the City Secretary his acceptance of the same in writing within ten days after the adoption thereof. The Mayor and City Secretary are hereby authorized and directed to sign and acknowledge such paper or papers as may be necessary to bear out any and all parts hereof.

SEC. 14. All ordinances or parts of ordinances heretofore passed by the City Council of the City of Ennis, Texas, that are in conflict with or opposition to this ordinance or any part thereof are hereby repealed.

Acceptance of A. M. Morrison.

9 I, A. M. Morrison of Ennis, Ellis County, Texas, the party mentioned and named in the foregoing ordinance which was regularly enacted by the City Council of the City of Ennis, Ellis County, Texas, on the 19th day of March, 1900, do hereby accept

the terms and conditions of the said ordinance and do here now present for filing this my acceptance of the same.

Witness my hand this — day of March, 1900.

(Signed) A. M. MORRISON.

Witness our hands in duplicate in the City of Ennis, Ellis County, this 22nd day of March, 1900.

CHAS. B. LEWIS,
Mayor City of Ennis.
C. M. BANNER,
Sec'y City of Ennis.
A. M. MORRISON.

THE STATE OF TEXAS,
County of Ellis:

Before me, the undersigned authority, on this day personally appeared C. B. Lewis, Mayor of the City of Ennis, C. M. Banner, Secretary of the City of Ennis, and A. M. Morrison all known to me to be the persons whose names are subscribed to the foregoing instrument, and acknowledged to me that they executed the same for the purposes and considerations therein expressed, and the said C. B. Lewis and C. M. Banner, Mayor and Secretary of the City of Ennis, respectively, acknowledged that they executed said instrument as the act and deed of the said City of Ennis for the purposes and consideration therein expressed.

Given under my hand and seal of office this the 22nd day of March, 1900.

J. B. BISLAND,
Notary Public, Ellis County, Texas.

10 IV.

That said contract after being duly executed, was filed for record in the office of the County Clerk of Ellis County, and was duly recorded in Book 116, page 223 of the Deed records of said County. That after securing the unlawful license and franchise hereinabove set forth, the said A. M. Morrison undertook to set up and maintain, and did set up and has since maintained, a partial system of water supply for the City of Ennis, and has connected his distribution pipes and his pumping machinery with the water supply and water mains belonging to the City, as aforesaid, and has located and now maintains upon the sites belonging to the City, as aforesaid, divers structures, pumping plants, engine rooms, etc., without any lawful authority thereunto conferred upon him; that he has caused to be incorporated under the laws of the State of Texas the defendant, Ennis Water Works, and has assigned to it the aforesaid alleged contract with the City of Ennis, together with certain physical properties belonging theretofore unto the said A. M. Morrison, and that since such assignment the said Ennis Water Works has claimed benefits under said contract, and is occupying the public property, streets, alleys and public highways of the City under the supposed

authority of said unlawful grant: that said Morrison was and is the principal stock holder and managing officer of, and the dominating influence controlling, the said Ennis Water Works; that such corporation and said Morrison make use of the aforesaid property, viz.; the Old Lake and the New Lake, and the water mains aforesaid, and maintain their own water system in the streets and alleys, and take water from the property of the City of Ennis aforesaid, all without lawful authority. Petitioner is not advised what are the terms of the contract of assignment from said Morrison to said Ennis Water Works, nor what reversionary interest the said Morri-
11 son has in the franchise aforesaid, nor what option for the reacquisition of same is held by him, and it prays that defendants be required to disclose their relationship to same, to the end that an effectual decree may be rendered therein.

V.

Petitioner shows that the contract aforesaid was and is contrary to the laws of the State of Texas, against public policy, unreasonable and unenforcible, in this;

a. Because the City of Ennis was without lawful authority to grant unto the said A. M. Morrison a franchise of the tenor described having duration of thirty years, such duration being unreasonable, tending to create a perpetuity and embarrass the City of Ennis in the exercise of its governmental and municipal functions.

b. The City of Ennis was without authority to grant a franchise of the tenor set forth, purporting to lease public property to a private individual for private gain, and purporting to grant to such private individual for private gain easements in and upon the public property, streets, alleys and highways of the City of Ennis.

c. The City of Ennis was without authority to grant a franchise of the tenor described, because same purports to create in the grantee a monopoly, perpetuity and exclusive and uncontrollable right, privilege and benefit, contrary to the inhibition contained in Art. I, Sec. 26, of the Constitution of the State of Texas, which provides, "Perpetuities and monopolies are contrary to the genious of free government, and shall never be allowed," and contrary to Art. I, Sec. 3, of said constitution.

d. The City of Ennis was without authority to grant a franchise of the tenor described, for that, same creates, or tends to
12 create a monopoly and a perpetuity, a grant of unreasonable duration and one unreasonable, prejudicial and hampering the City of Ennis in the exercise of the functions imposed upon it by law for the benefit of its inhabitants.

e. The City of Ennis was without authority to enter into the alleged contract, because same constituted an attempt on the part of the City to surrender and barter away, and on the part of the said Morrison to obstruct, the legislative discretion imposed by law upon the City for the benefit of its inhabitants.

f. The City was without lawful authority to grant a franchise of the tenor described, because the same would have the necessary

effect of limiting the legislative authority and discretion of succeeding law-making bodies of the City of Ennis, and embarrassing them in the exercise of that discretion which by law is imposed upon the law making bodies of such municipalities.

VI.

That, for the reasons set forth in this petition, the assumption by the said A. M. Morrison and his assignee, Ennis Water Works, of the right of any easements upon, or privileges respecting, the public property of the City of Ennis, or its Streets, alleys and highways, was from the beginning, and at all times since has been and still is, without lawful authority, and said alleged franchise wholly null and void and unenforcible in every respect.

VII.

That notwithstanding the premises, the said defendants have pretended to perform the meagre duties purporting to be imposed upon them under the terms of the ordinance hereinbefore set out, but said defendants wholly failed to perform such duties, breached such franchise and violated their obligations assumed thereunder,
13 and the condition therein set forth; that at all times since the making of said alleged contract, and now, the said defendants, though in possession of said reservoir and water pipes, and in possession of the pumping sites appropriated by them, and being the sole beneficiaries of the waters impounded by the City, and being under the duty to provide water to the City, as set forth in said ordinance, and to exercise all diligence to furnish water reasonably pure and wholesome and in reasonably sufficient quantities, it has at all times failed so to do; that it has wholly failed to protect such water from pollution, or to clean the basin wherein same is contained, or keep the same clean from weeds, trash or other contamination; that it has allowed silt and filth, flowing into the basin, to enter, without effort to prevent same, and has made no effort to remove same; that in taking water from such reservoirs it has drawn same from such places as to secure muddy and impure water, and has refused to correct this location of its service pipes after having its attention drawn thereto; that it draws water from such portions of said basin as to include decaying vegetable matter into the pipes and *of* the inhabitants of the City, and its protection of said reservoirs has been so inadequate, and the said reservoirs are now so unsanitary, as to make same unavailable as reservoirs until thoroughly drained and cleaned, and that during the — 1909 it suffered said reservoirs to become entirely exhausted and made no alternative provision or attempt to provide an additional or alternative supply of water for the City; and wholly failed and refused to comply with its obligation to furnish to the City, as agreed, water for domestic and other uses and preventing and extinguishing fires; that therefore, the City was compelled to expend large sums of money to drill artesian wells
14 and to provide an independent source of water supply; and that since about August 1, 1909, the City, at its own expense,

has furnished for municipal purposes, and to its inhabitants the supply of water which the defendants had contracted to supply and wholly failed and refused so to do.

That said defendants have never supplied for the use of the City and its inhabitants water with the pressure prescribed in said contract, viz: a pressure equal to that which results from 80 feet of water in the standpipe, and has never provided any increase in the pumping capacity at all adequate to the increase of the growth of the City of Ennis; that the service pipes laid and used by the defendants are so old and worn, rusty and weakened, and so irregular in size, and laid with such want of reference to the source of supply, as to make it impossible for the City to obtain from said defendants any adequate or reasonable service of water for the purposes set forth in said ordinance.

That with reasonable service pipes and the contracted pressure maintained, adequate fire protection and water service could be kept and maintained; that the pressure actually furnished was wholly inadequate for extinguishing fires and not of sufficient force even to carry water to the first floor of ordinary residences, at times scarcely flowing at all out of the nozzle of the fire hose, and as a direct result thereof insurance rates increased and much property of the citizens of the City of Ennis has been destroyed, including among others the property of J. M. Chapmen, The Ennis Pharmacy, Cottage Hotel, John Rawlins, C. S. Roland, B. Martin, Dr. Hackler, John Telfair, the old Stewart homestead, Mrs. Sims' residence, Geo. Todd, Mrs. Doyle, the Roundhouse Store, and others, and that during all
15 the years of said contract the property of said City and of the citizens of the City has been and still is in unreasonable jeopardy from loss or damage by fire by reason of the absence of proper fire pressure; except that, since the City has been forced to commence such service which it has been able to maintain and has maintained, suitable and reasonable pressure and service has been afforded the City, subject to the difficulties consequent upon the defective pipes and unscientific distribution of the system of the City.

That defendants have never supplied, do not now supply, and evince no intention of supplying, to the city any clear, wholesome water, or any fire pressure reasonably adequate, or any pressure equal to that which would result from 80 feet of water in the standpipe; that these defendants could, and reasonably ought to have provided a water supply from other sources than the reservoirs herein mentioned, and could have safeguarded, and reasonably ought to, have safeguarded, such reservoirs from the conditions herein described, but they and each of them have failed and still fail to perform this duty or any part thereof.

That by reason of the premises the defendant, if such franchise be held in any respect valid, have wholly breached the same, and same has long since become subject to forfeiture by the City, and all of the rights and privileges purporting to be granted thereunder have become void and have reverted to the City.

That while complainant City never formally complained to de-

fendant of the alleged breach of contracts hereinabove set forth, the defendants and each of them have at all times actually known that they were violating said contract and doing the acts herein complained of, and wholly failing to comply with the obligations thereunder.

16 VIII.

That plaintiff has demanded possession of its property from defendants and has demanded that defendants relinquish their pretended rights under said illegal contract, and that defendants vacate the streets, alleys and highways and public property of the plaintiff; that defendants have refused such reasonable requests and still so refuse.

IX.

That heretofore, viz.; in view of the premises herein set forth, the City of Ennis, through its City Council, on April 22nd, 1909, duly and legally enacted a certain resolution or ordinance, as follows, viz.:

"Be it ordained by the City Council of the City of Ennis that those certain franchise rights claimed by A. M. Morrison and his assigns and the Ennis Water Works, a corporation, under the supposed authority of an ordinance adopted by the City Council of the City of Ennis on March 19th, 1900, and under the supposed authority of an attempted contract purporting to be based upon said ordinance, which contract bears the signature of the Mayor and Secretary of the City of Ennis and A. M. Morrison, of date March 22nd, 1900, were and are claimed and exercised illegally and without authority, contrary to the constitution and laws of the State of Texas, and said so called ordinance and contract have always been, and still are, null and void, and moreover have become forfeited to the City of Ennis by reason of the misconduct of the said A. M. Morrison and his assigns and the said Ennis Water Works, and by reason of said facts and of the nonuse and misuser of the rights defined in said contract, said attempted ordinance and contract have become and are hereby declared to be cancelled, terminated, null and void.

The City of Ennis hereby accepts the nullity of said franchise ordinance and contract, and directs that said franchise rights be reclaimed.

17 "Be it further ordained, that appropriate action be brought in courts of competent jurisdiction to prevent the longer unlawful use of said franchise by said persons and corporation, and to adjudicate the nullity of said claim of franchise and to regain for the City its rights in the premises.

That any such action, or actions, of ancillary relief or remedies may be invoked on behalf of the City of Ennis, and all other proceedings taken that may be deemed necessary in the premises to secure to the City the fullest protection and relief afforded it by the law.

"Be it further ordained, that the aforesaid ordinance of date, March 19, 1900, purporting to grant certain franchise and rights to the said A. M. Morrison be and the same is hereby in all things

repealed and the alleged contract purporting to be based on said ordinance cancelled.

"Be it further ordained, that all the rules, laws and ordinances requiring that ordinances be read on three several days, be and the same are hereby suspended, and that this ordinance take effect and be in force from and after its passage."

That by the terms of said ordinance the City of Ennis has declared the forfeiture, cancellation and annullment of the alleged franchise of March 19, 1900, and has directed and authorized its officers to secure judicial determination of such rights, and that under such ordinance, as well as pursuant to the general authority vested in it by law, the City of Ennis has terminated the alleged rights of the defendants under such unlawful contract, and has authorized the commencement and prosecution of this suit.

X.

That thereafter, on March 15, 1910, the City of Ennis
18 through its City Council, duly and legally enacted an ordinance as follows, viz.:

"Be It Ordained by the City Council of the City of Ennis, that all franchise rights claimed by A. M. Morrison and the Ennis Water Works, or either, as original grantees thereof, or as assignees, transferees, or successors in interest of franchises granted to persons, firms or corporations other than the defendants or either of them, under the supposed authority of any ordinance, resolution or other act of the City Council of the City of Ennis, or under the supposed authority of any contract or attempted contract purporting to be based thereon, were and are claimed and exercised illegally and without authority, contrary to the constitution and laws of the State of Texas, and said alleged rights, franchises, claims, ordinances and contracts have always been and still are null and void, and moreover, have become forfeited to the City of Ennis by reason of the misconduct of the said A. M. Morrison and the said Ennis Water Works and each of them, and by reason of said facts and of the nonuser and misuser of the rights defined in said contract, said attempted ordinances and contracts have become and are hereby declared to be cancelled, terminated, null and void. The City of Ennis hereby accepts the nullity of said franchise ordinances and contracts, and directs that same be reclaimed.

"Be It Further Ordained, that proper action be brought in Courts of competent jurisdiction to prevent the longer unlawful use of such by any persons, firms or corporations and to adjudicate the nullity of the same and regain for the City its rights in the premises; that in any such action or actions all ancillary relief or remedies may be invoked on behalf of the City of Ennis, or other proceedings taken that may be deemed necessary in the premises to secure to the
19 City the fullest protection and relief afforded by law.

"Be It Further Ordained that the aforesaid franchise ordinances, resolutions or other acts, be and the same are hereby, each and all, in all things repealed, and all alleged contracts or agree-

ments, franchises or privileges purporting to be based thereon, cancelled.

"Be It Further Ordained that all rules, laws and ordinances requiring that ordinances be read on three several days be and the same are hereby suspended, and that this ordinance take effect and be in force from and after its passage."

That by virtue of said ordinance all claims of the defendants of any rights and privileges in the streets, alleys and highways and upon the public property of the City of Ennis has been in all things declared to be null and void, and the proper officers of said City have been instructed to secure judicial determination of same, and thereunder, as well as under the authority vested in said City by law, this suit has been instituted and is being prosecuted.

XI.

That for ten years last past the defendant, Ennis Water Works, without lawful authority so to do, has withdrawn from the reservoirs of the City of Ennis, and thereupon has appropriated to its own use and has converted, large quantities of Water impounded by the City in the reservoirs aforesaid, and has sold such water through its service pipes to consumers in the City of Ennis as a matter of private enterprise and for gain; that the value of the water annually so withdrawn from the City's property and appropriated and converted by the said defendant is Three Thousand Dollars, making a total of Thirty Thousand Dollars; that during such period of time the said defendant has wrongfully retained and appropriated to its private use and benefit the water pipes belonging to the City, as hereinbefore described, same having a reasonable annual rental value of Five Hundred Dollars, making a total sum of Five Thousand Dollars for the period of time stated; that the said defendant, Ennis Water Works, by reason of the premises, became liable, bound and obligated to pay to the City such reasonable sums aforesaid, but though demand has been made upon it therefor, it has heretofore failed, and refused, and still fails and refuses to pay same or any part thereof, to plaintiff's damage Forty Thousand Dollars.

XII.

That by reason of the alleged invalidity of the franchise aforesaid and the alleged misuser by defendants of the rights claimed thereunder; and by reason of their alleged gross abuse of and failure to perform the obligation which they purported to assume thereunder of supplying the City of Ennis with a reasonable supply of wholesome water, the City has commenced and is now constructing its own system of water works; that it has drilled artesian wells and is constructing such alternative system; that a reasonable time will be required to make such alternative system adequate, and until completed the City is bound to use and is using some of the service and distribution pipes belonging to the defendants, and upon decree herein cancelling the wrongful claims of the defendants, it will be necessary, in the public interest, that for a reasonable time such

service pipes may be continued to be used by the City, or that defendants by appropriate order be required to render such service on fair and reasonable terms.

Wherefore your petitioner prays, the defendants having heretofore been cited to appear and having appeared herein, that
21 on final hearing it have judgment cancelling and annulling the alleged contract, ordinance and franchise of March 19, 1900, being the ordinance first hereinabove set out in full, and all other ordinances, franchises and contracts, if any, pertaining to such water system and requiring the defendants within a reasonable time to remove their service pipes from the public streets, alleys and highways of the City, and to vacate their use of the City's property, streets, alleys and highways, and requiring the said defendant Ennis Water Works, for a reasonable time after such final decree, in case it resumes possession of the service pipes now used by the City in its service to its own citizens, to render the water service essential to the health and safety of the inhabitants of said City of Ennis pending the completion by the City of its municipal water plant now in course of construction; and for such other and further relief as to the Court may seem proper.

SPENCE, KNIGHT, BAKER & HARRIS,
Attorneys for Plaintiff, City of Ennis.

Endorsed: No. 7656. City of Ennis vs. Ennis Water Works et al. Plaintiff's first amended Original Petition. Filed the 4th. day of March 1910. Anzi Carothers, District Clerk, Ellis County, Texas, by Dan Wilson Deputy.

22 *Defendant's First Amended Original Answer.*

In District Court of Ellis County, Texas.

No. 7656.

CITY OF ENNIS
vs.
ENNIS WATER WORKS et al.

Def't's 1st Amended Original Answer.

Now comes Ennis Water Works, a Corporation duly incorporated, one of the defendants in the above styled and numbered cause, by its attorney, and by leave of Court, amends its original answer filed herein on June 2nd, 1909, and now for answer herein says:

I.

Overruled.

Plaintiff's Petition is insufficient in law to properly state a cause of action, and is specially insufficient in law in the following particulars, to-wit:

(I.)

Overruled.

The ordinance first set out in said petition appears therefrom to have been passed in the valid and proper exercise of Municipal power on the part of the City of Ennis, and from the facts alleged it appears that such ordinance, and the agreement of parties made thereunder, constituted a valid and binding contract between the City of Ennis and A. M. Morrison and now constitutes a valid contract between said City and the defendant corporation and his assignees, and the 2nd and 3rd ordinances set out in said petition, attempted to be passed by the City Council of the City of Ennis on April 22", 1909, and March 15th, 1910, undertaking to avoid said ordinance first set out, and the contract made thereunder, are laws impairing, or attempting to impair, the obligation of a contract, and are violative of Sec. 10, Article I, of the Constitution of the United States.

23 (2nd.)

Overruled.

The ordinances of April 22", 1909 and March 15", 1910, set out in plaintiff's petition in so far as they attempt to declare a forfeiture of the rights of defendant under the ordinance first set out, and the contract thereunder, because of alleged non user and mis-user of franchises and rights conferred are ineffective in law to work any forfeiture, but are, at most, no more than authority to the City officials to seek a judicial forfeiture of defendant's rights and franchises under the ordinance first set out, and the contract made thereunder, and the facts alleged do not show a right in Plaintiff to such forfeiture apparent from the ordinance and contract themselves.

(3rd.)

Overruled.

The allegations of the 7th paragraph of Plaintiff's Petition are insufficient to entitle it to any forfeiture because—

1st. It is apparent that the ordinance of March 19th, 1900, and the contract thereunder, contemplated that the water to be furnished under such ordinance and contract to be taken from the City's Lakes, and no rights in or to such Lakes were conferred upon defendant Morrison and his assigns other than to take such water from said lakes, and for this purpose, to have the right of entry upon and of ingress and egress to and upon the grounds of the City and to erect and maintain thereupon machinery, structures and improvements necessary to the contemplated water business and the ordinance and contract not only did not impose upon defendant Morrison and his assigns, the several duties in respect to said lakes, breeches of which are alleged as causes of forfeiture, but under such ordinances
24 and contract they would have had no legal right to do the things, failing to do which is attempted to be made grounds of forfeiture.

Overruled.

2nd. It does not appear from the ordinance and contract set out that Morrison and his assigns were under obligation to furnish, or

were expected to furnish, water other than from the lakes in said petition mentioned, or of quality other than that contained in such lakes, and the alleged failure to furnish other or better water states no cause of forfeiture.

Sustained.

3rd. It does not appear that the ordinance and contract sought to be avoided contemplated, or required Morrison and his assigns to make provision for an alternative supply of water in case of exhaustion of supply in the City lakes, or that he was to be held responsible for failure of such supply, hence failure of such supply, and failure to furnish, an alternative supply, if there have been such failures, furnish no grounds for forfeiture.

Sustained.

4th. It does not appear that the City itself ever, before the institution of this suit, complained of the several matters of alleged fact, now urged as grounds for forfeiture, and gave defendants an opportunity to remedy them, and it does not appear that the alleged failures of duty, if such failures there were, were willful and intentional, and in wanton disregard of the duties of Defendants, or either of them, under the ordinance and contract sought to be avoided, nor does it appear that the City itself ever demanded, or insisted upon a better pressure for fire protection than was actually furnished, or even through its proper representatives, ever complained of the pressure furnished, or of the character of mains and other pipes in use by defendant, or before the institution of this suit, gave defendant an opportunity to remedy defects in its plant, if there were such defects as are alleged.

5th. It does not appear but that the defects alleged to exist in this defendant's plant, if they do exist, could be easily remedied, or that it ever, after proper demand, refused to remedy any material defect pointed out by the City, and generally, the matters of fact alleged as grounds of forfeiture seem to be matters of which the City never complained before the institution of this suit.

Sustained.

4th. It appears that whatever use the defendants have made of the City's lakes and water main has been under a contract with the City in which it never at-empted to repudiate until April 22nd, 1909, and the claim now made to recover the alleged value of water taken from such lakes under the contract now sought to be avoided, and the alleged rental value of the City's water main mentioned in the petition, prior to said act of repudiation is unfounded, and is without merit, even if a right of such recovery subsequent to said act of repudiation would arise from the fact pleaded.

Overruled.

5th. Even should the Court be of opinion that the franchise contract is void or uninforceable as to hydrants rentals, this is no ground for declaring the contract void in toto, and such stipulation if void is no ground for forfeiting the entire contract.

And of all the foregoing defendants prays the judgment of the Court.

26 II.

Further answering defendant says:

1st. Prior to and in 1891, the City of Ennis was the owner of one of the lakes mentioned in its petition in this cause, to-wit the one now denominated "the old lake," which it had procured and held as a source of public water supply and in that year said City granted to a corporation known as the Ennis Ice, Light and Water Co. which was to, and did, construct a water plant according to specifications approved by the City Council of the City of Ennis, the right and privilege, subject to certain rights of the Houston and Texas Central Rail Road Company, for a term of thirty years, of supplying said City of Ennis and its inhabitants with water for domestic and other uses including fire protection, with the privilege to said corporation of taking all the water required for such purposes from said lake, now denominated "the old lake." The right and franchise so granted were, in other respects, to a great extent, substantially in terms, and upon conditions, similar to those granted defendant Morrison by the terms of the ordinance of March 19th, 1900, and the contract thereunder set out in Plaintiff's Petition, save that under such franchise and ordinance the City was to pay $2,100.00 per annum for thirty five hydrants, and $65.00 each per annum for such additional hydrants as might be furnished it by said Company.

2nd. Prior to March 19", 1900, the lake called "the new lake" in the petition herein, had been constructed by the City of Ennis, as an additional source of public water supply, and defendant Morrison had become the owner of the water plant, and water franchises, of said Ice, Light and Water Co. and was supplying said City with water thereunder on said 19th day of March, 1900, when the
27 ordinance of that date set out in Plaintiff's Petition was passed by the City Council of the City of Ennis, and subsequently, on to-wit, the 22nd day of March, 1900, the contract under said ordinance between the City of Ennis and defendant Morrison set out in Plaintiff's petition was duly executed, and entered into, as alleged in Plaintiff's Petition.

3rd. In entering into the contract above mentioned it was the intent and purpose of said contract, and the contemplation and expectation of the parties thereto, that the water to be furnished under it should be taken from the lakes mentioned in said contract and ordinance, and be such as said lakes would supply, and no other source of supply was contemplated by said contract and ordinance, or by the parties to such contract when it was made, and said contract, as appears from its face, was subject to a certain contract or contracts before that time entered into by and between the City of Ennis and the Houston and Texas Central Railroad Company, with reference to the use of water from said lakes, for its purposes, even if the exercise of such right resulted in depriving the City, and its inhabitants generally, of all water supply.

4th. On to-wit: Feb. 4th, 1901, defendant Morrison, for a valuable consideration, assigned, conveyed and transferred his water system and plant in the City of Ennis, together with all of his rights and franchises under the contract above mentioned to his co-defend-

and herein, the Ennis Water Works, a corporation duly incorporated under the laws of this State, of which assignment the City of Ennis had due notice, and said corporation is now, and since said date has been, the owner of, and has exercised, and still exercises, the rights and franchises so granted and assigned, and since said date defendant Morrison has claimed no interest in such contract,
28 rights and franchises except as a stockholder in said corporation, as he is, and as an officer thereof, he being the president, and general Manager of said corporation.

5th. Since the passage of the ordinance of March 19", 1900, and the execution of the contract thereunder set out in plaintiff's petition neither of the defendants herein have claimed, and the defendant Company does not now claim, any interest in the lakes mentioned in said petition, or in the grounds of the City of Ennis adjacent thereto, other than to take water therefrom for the use of the City of Ennis, its inhabitants, and inhabitants of the vicinity, together with the right of entry upon, and of ingress and egress in and upon such adjacent land for the erection, maintenance and operation of such machinery and improvements thereon as has been, and may be, necessary for the proper conduct of the water supply business contemplated by the contract in this suit sought to be avoided; neither do defendants, or either, claim any interest in the line of water main, of the City mentioned in plaintiff's petition, other than such rights as the defendant Company is entitled to, as assignee of defendant Morrison, under the contract herein in issue; the defendant Company claims no exclusive rights of possession of said lakes, but expressly disclaims any such right, and, as advised, denies that it is, or has been, under any legal obligation to care for, improve, repair or protect said lakes, as plaintiff's petition seems to claim, and the defendant Company has never objected, does not now, object, and disclaims any right to object, to any act, or acts, of the City of Ennis for the proper protection, repair or improvement of said lakes, consistent with its rights under the contract herein in issue.

29 6th. Since the organization of the defendant Company and its acquisition of the rights and franchises granted by the City of Ennis to its co-defendant herein, it has, in good faith, tried to comply, and reasonably has complied, with the obligations assumed under such grant, and the assignment to it, and has, in good faith, attempted to perform, and reasonably has performed, the duties to said City, and the public, imposed upon it, as assignee of the rights and franchises granted said Morrison by said City, as the same were originally granted, or have since been modified, and it has reasonably complied with all legitimate demands of said City, made under such grants, and if its supply pipes have been misplaced, as alleged, which said defendant denies, resulting in furnishing, muddy water as alleged, this has been merely the result of mistaken judgment, and such error, if shown, will be remedied to the extent of defendant's power, and it has furnished in reasonable quantities such water as was contemplated by the ordinance and

contract herein sought to be avoided, until it suspended action as will be hereinafter explained.

7th. About March, 1902, the stipulations of Sec. 6 of the ordinance of Mch. 19", 1900, in respect to water pressure having been found unsatisfactory, this defendant and the authorities of the City of Ennis entered into a different and other agreement in respect to such water pressure to the effect, in substance, that when a fire alarm was given defendant would furnish direct pressure from and through its mains to fight fire, to aid in which the City would employ some person to turn a valve and cut off the standpipe from the water system and plant, so that direct pressure could be given, and ever since about Mch. 1902, pressure for fighting fire has, while it operated its plant, been furnished by the defendant under this modified
30 agreement, and defendant has in good faith always attempted to comply, and has reasonably complied, with such modified agreement, and has never voluntarily, intentionally, or willfully violated the same; and never until the institution of this suit, from the time such modified agreement was entered into, did plaintiff, the City of Ennis, make complaint of the water pressure so furnished, or demand of this defendant, other, different or better pressure than was so furnished, and while this defendant is ignorant whether or not the records of the City of Ennis fully show this modified agreement, yet it avers and charges that such agreement was actually made, and has been acted upon, as above stated, and plaintiff up to the institution of this suit failed, as above stated, to complain of, the pressure so furnished, or to demand other, different or better pressure, wherefore defendant says that it, the said plaintiff has no right now to ask or claim a forfeiture of this defendant's rights because of a failure, if such there was, to maintain a pressure in its mains equal to what would result from 80 feet of water in the standpipe, but is estopped from claiming.

8th. The defendant company charges, as advised, that the ordinance of March 30th, 1900, set out in plaintiff's petition was passed in the exercise of proper and legitimate municipal power on the part of the City of Ennis, and the same was, and is, a valid ordinance of the City of Ennis and when the same was accepted by the defendant Morrison, and the contract shown by plaintiff's petition was executed by and between him and the officers of said City, as shown by said petition, such ordinance and contract, became, was, and is, a valid and binding contract between said City of Ennis and the defendant Company; as assignee of said Morrison, and said defendant Company, as advised, further charges, and insists, that the ordinances of April 22nd, 1909, and March 15th, 1910, set out in plain-
31 tiff's petition, undertaking to avoid said ordinance of March 19th, 1900, and the contract made thereunder, are laws impairing or attempting to impair, the obligation of a contract, and are violative of Article 1, Sec. 10, of the Constitution of the United States, and this defendant now pleads and insists upon, its rights under the provisions of our Federal Constitution above mentioned.

9th. The defendant corporation further says that since the assignment by its co-defendant Morrison to it, above mentioned, it has

been recognized by plaintiff the City of Ennis, as the assignee of said Morrison of his rights under the contract herein sought to be avoided, and while said City has been making efforts for additional water supply, it never, until the passage of the ordinance of April 22nd, 1909, set out in its petition attempted to deny the binding force of the contract herein sought to be avoided.

10th. By Section 10 of the ordinance and Contract herein sought to be avoided, as appears from plaintiff's petition, the plaintiff therein, the City of Ennis, reserved to itself the right to acquire by purchase, and become the sole owner of, the water works system then belonging to Defendant Morrison, and as the same might be extended, at the expiration of five years from making of contract therein in question, and at the end of periods of five years thereafter, upon giving twelve months' notice of such intention and paying the value of such property at the time of purchase, franchise not to be valued in the appraisement.

By the further provisions of said section, the value of said property for the purpose contemplated by said section was to be ascertained by appraisement, each party to select a disinterested and
32 competent person for that purpose, and if said appraisers should fail to agree, they should select an umpire to act with them, which umpire should pass upon the points of disagreement between said appraisers. At the end of the first of said five years periods, at the instance and request of said City of Ennis, this defendant extended the option of the City to purchase said property to the 19th day of March, 1907, provided, only, that the defendant Company during said period of extension should not be bound to extend its mains unless it saw fit to do so, but the extended option was never exercised by the City.

This defendant further says that it has at all times been, and is now, ready to abide by the stipulations of said Section 10 of the ordinance herein sought to be avoided, and though the City has not given the notice of intention to purchase required by the provisions of said section of said ordinance, yet this defendant has, time and again, offered to waive such notice, as well as the unexpired time of said second year period, and to sell its water plant to the City under and in accordance with the appraisement and provisions of said section 10 of said ordinance, and defendant here now again specifically offers to waive said matter of notice, as well as the matter of the unexpired time of the second five year period, and to accept from plaintiff the value of its said plant, to be ascertained and determined in the manner provided for in said section 10 of the ordinance herein in question.

11th. Further than as may have been above admitted, defendant denies all and singular the allegations of plaintiff's petition.
33 12th. Plaintiff, the City of Ennis, not only never repudiated or attempted to repudiate the contract herein sought to be avoided until the passage of the ordinance of April 22nd, 1909, set up in its petition, but up to that time the services of the defendant Company, under said contract, and its City Council allowed to Defendant Company for the services so rendered, water furnished

and hydrant rentals up to that date and ordered the issuance of warrants to cover the amounts so allowed aggregating $1,031.00, but the Mayor of said City refused to sign such warrants and the City Council has since revoked said allowance and now fails and refuses to pay said sums so allowed or any other sum not withstanding said ordinance of April 22nd, 1909, but plaintiff City continued to demand and receive of the defendant Company water for fire protection and other purposes and through the hydrants mentioned in the contract sought to be avoided until on to-wit the 29th, day of July 1908, when to meet an emergency resulting from the exhaustion of the water supply in plaintiff's lakes the defendant Company turned over its plant to the officials of the City for use in connection with the additional water supply which it had obtained, such an arrangement to continue without prejudice to the rights of either party until such emergency ended or until the parties might otherwise agree and such temporary arrangements still exist but the plaintiff is justly indebted to defendant Company for hydrant rentals and water furnished in accordance with the contract up to said 29th. day of July, 1908, or if not indebted in accordance with the contract it is indebted to the defendant Company for services so rendered to the amount of the reasonable value thereof, which defendant alleges was and is $2,000.00, and for which sum it reconvenes and demands judgment.

34 13th. The Defendant, A. M. Morrison, says that he has no interest in the subject matter of this controversy save and except as a stock-holder in and officer of the defendant corporation, the Ennis Water Works, as set up in the answer of said defendant, wherefore he prays to be hence dismissed with its costs or if he held then he adopts in all of its parts the foregoing answer of his co-defendant herein as his answer in this action.

G. C. GROCE,
Attorney for Defendants.

Endorsed: No. 7656. City of Ennis vs. Ennis Water Works et al. Defendants' First Amended Original Answer. Filed the 18th day of March 1910. Amzi Carothers District Clerk, Ellis County, Texas, by Dan Wilson, Deputy.

35 *Plaintiff's 1st Supplemental Petition.*

No. 7656.

CITY OF ENNIS

—

ENNIS WATER WORKS at al.

Suit Pending in the District Court of Ellis County, Texas.

Plaintiff's 1st Supplemental Petition.

Now comes the plaintiff, the City of Ennis, and replying to the defendants' original answer, filed herein on March 18th, 1910, files this its First Supplemental Petition, and shows:

1.

That plaintiff excepts to that portion of the answer of the defendants which sets up an alleged earlier grant to Ennis Ice, Light and Water Company; for that, the allegations concerning such alleged franchise are too vague, general and indefinite, and neither by express allegation nor by the production of exhibit are the terms, provisions and conditions of said franchise set out.

2.

Plaintiff specially excepts to such allegations, for that, it is not made to appear that such earlier franchise and ordinance is in any wise pertinent or relevant to the issues in this proceeding, and of this the plaintiff prays the judgment of the Court.

3.

Plaintiff specially excepts to the allegations in said answer set forth to the effect that prior to March 19, 1900, the defendant, A. M. Morrison, had become the owner of the water plant and water franchises of the Ennis Ice, Light and Water Company; for that, such allegations constitute a conclusion on the part of the pleader, and the means by which such defendant claims to have acquired such franchises are not in anywise set forth, and of this the plaintiff prays the judgment of the Court.

36

4.

Plaintiff specially excepts to the allegations in said answer contained wherein an attempt is made to introduce into the contract of March 19, 1900, an alleged intent and purpose not set forth nor manifest in said instrument to the effect that the water which the grantee undertook to furnish to said City under such ordinance was to come from the lake mentioned in such contract and ordinance and not elsewhere, and to the effect that no other source of supply was contemplated by said ordinance and contract; for that, no fraud, misconduct, duress or other equitable grounds are alleged for reforming such contract by incorporating such foreign matter or by adding to, qualifying or limiting its terms, and of this exception plaintiff prays the judgment of the Court.

5.

Further answering, plaintiff denies all and singular, the facts in said answer set forth, and of this puts itself upon the Country.

6.

For special replication herein this plaintiff shows to the Court that, if the City of Ennis in 1891 did grant to a corporation known as the Ennis Ice, Light and Water Company, the franchises alleged in defendants' answer, and if the defendants ever acquired and owned such alleged franchises, which is not admitted but denied,

such alleged franchise was in all respects subject to the defects and infirmities and to the grounds of invalidity attaching to the alleged franchise of March 19, 1900, as such grounds are set forth in plaintiff's first amended original petition herein, which is here referred to for specification; and that such franchise of 1891, if ever valid, has itself become breeched for misuse and nonuse in the various particulars complained of with respect to the ordinances of March 19, 1900, as set forth in said amended original petition of plaintiff, which is here referred to for specification. Further, that if such ordinance was ever in fact granted and acquired by defendants, which is denied, same was abandoned by the parties on or about March 19, 1900, and since that date the defendants have not complied with same in any particular, nor have they attempted to comply with same, but have proceeded under the supposed authority of the said contract of March 19, 1900.

37

That by reason of the premises, the rights, if any, claimed under such earlier franchise were and are in all respects void and unenforcible; and the defendants have not now and have never had any right to the easements which they enjoy and the claims which they assert against the City of Ennis, and of this plaintiff prays the judgment of the Court.

7.

For further special replication herein plaintiff denies that it is in anywise liable to the defendant company for hydrant rentals and water furnished, as claimed in the eleventh paragraph of defendant's answer on file; for that, the defendant company wholly failed and refused to furnish to plaintiff water of the quality contemplated in the original alleged contract therefor; and for that, the defendant company has wholly failed and refused to furnish fire hydrants or water of the quantity, quality and with the pressure stipulated in said contract, and it has in all respects failed to comply with its contract obligations pertaining thereto; and for that further, the alleged contract under which said service was pretended to be rendered was void for illegality, as set forth in plaintiff's amended original petition filed herein; that the City of Ennis through its Council has disapproved such claims and has by resolution ordered all warrants therefor to be cancelled, and has directed and required its officers not to pay such sums or any part thereof to said defendant company.

38

Wherefore, no liability exists against the plaintiff on such claim and no mandamus ought to issue against its officers thereon.

Wherefore, having fully replied to said answer of defendants, plaintiff prays as in its first Amended Original Petition, and for general relief.

SPENCE, KNIGHT & HARRIS,
Attorneys for Plaintiff, City of Ennis.

Endorsed: No. 7656. City of Ennis vs. Ennis Water Works et al. Plaintiff's First Supplemental Petition. Filed, the 18th day of March 1910. Amzi Carothers, District Clerk, Ellis County, Texas, by Dan Wilson Deputy.

39 *Order of Court.*

7656.

CITY OF ENNIS
vs.
ENNIS WATER WORKS.

SEPT. 28TH, 1909.

Defendant demands a jury.

7656.

CITY OF ENNIS
vs.
ENNIS WATER WORKS.

FEBRUARY 28TH, 1910.

Both parties granted leave to amend.

40 In District Court of Ellis County, Texas, February Term, 1910.

No. 7656.

CITY OF ENNIS
vs.
ENNIS WATER WORKS et al.

At the request of counsel, in the above styled and numbered cause, in the district Court of Ellis County, Texas, the Judge of said Court, makes, and will file, the following as his conclusions of fact, and of law, separately, in said cause.

Conclusions of Fact.

I.

Conclusions of Law and Fact.

That on March 19th, 1900, the City of Ennis was and for years prior thereto had been a duly incorporated City, and municipal corporation, located in Ellis County, Texas, and incorporated as a City under the general laws of this State, and on and prior to that date was exercising its corporate functions in the territorial area authorized by its act of incorporation, and that on that date it had, and still has, a population exceeding five thousand inhabitants, and a corporate area of several square miles; that within its limits are the lines of two systems of railway, viz; the Houston and Texas Central Railway Company and the Texas Midland Railway Company, and

divers cotton Gins, an Oil Mill, divers Banks, mercantile establishments, homes, Hotels, and other public institutions.

II.

That on March 19th, 1900, the City of Ennis owned and ever since has owned two large reservoir sites and lakes of im-
41 pounded water, together with land pertaining thereto, which will be hereinafter referred to as the "New Lake", and the "Old" Lake," (both more particularly referred to in the franchise ordinance that will be hereinafter mentioned, and which is fully set out in paragraph 3, of plaintiff's first amended original petition,) and at the same time said City owned and still owns about 8000 ft. of valuable cast Iron, 8 inch Water mains which connected said "New Lake" with a distribution system in said City, then owned by Defendant A. M. Morrison. And on said day of March 1900, the water supply of said City of Ennis and its inhabitants and industries including divers Railways, Cotton Gins, Oil Mills, Business houses, residences, and other institutions of the City, was being taken from the reservoirs above mentioned, and distributed through said distribution system owned by said Morrison, and said lakes and mains were then and are now worth $10,000.

III.

That on March 19th, 1900, the then City Council of the City of Ennis passed an ordinance purporting to give and grant unto Defendant A. M. Morrison, his heirs and assigns for a term of thirty years, the right and privilege to supply to the City of Ennis and the inhabitants thereof, and of territory adjacent thereto, with water for domestic and other uses, and for preventing and extinguishing fires, under certain terms, conditions and limitations, in such ordinance set out, (which said ordinance is fully set out in paragraph 3 of plaintiff's first amended original petition, beginning: "Be it ordained by the City Council of the City of Ennis, Texas, that" etc. and containing fourteen sections, for full contents of which reference is here made to the 3rd paragraph of plaintiff's first amended original petition herein, to be considered as copied verbatim in these
42 findings,) and by such ordinance the Mayor and City secretary of said City were authorized and directed to enter into a contract with said Morrison according to the terms of said ordinance if accepted by him, and to sign and acknowledge such papers and documents as might be necessary to perfect and carry out such contract.

I further find that said A. M. Morrison accepted the terms and conditions of the ordinance above mentioned, and that on the 22nd day of March, 1900, he for himself and Chas. B. Lewis, Mayor of the City of Ennis, and C. M. Banner, Secretary of said City, for and on behalf of said City entered into a contract in accordance with the terms and conditions of said ordinance which contract is fully set out in the third paragraph of Plaintiff's first amended original petition, which embodied said ordinance, and for the terms and

conditions of such contract reference is here made to the 3rd paragraph of Plaintiff's first amended original petition herein, which for purposes of greater particularity is considered as being copied verbatum in these findings.

IV.

I further find that immediately following the execution of the contract above mentioned the defendant Morrison proceeded thereunder to furnish water to the City of Ennis, its inhabitants, and the inhabitants of the vicinity of said City, and located upon the lands of the City, divers structures, pumping plants, engine rooms etc. the water furnished by him being taken from the above mentioned lakes or reservoirs belonging to the City of Ennis, and that he continued thus to furnish water to said City, its inhabitants, and the inhabitants of the vicinity, until about the 4th day of Feb-
43 ruary, 1901, when by deed of that date he assigned to the Defendant, Ennis Water Works, a corporation duly incorporated under the laws of this State, all of his rights under the ordinance and contract above mentioned together with the physical properties which he had erected for use in connection with such contract, and his distribution plant through which such water was being supplied, and since such assignment, said Ennis Water Works has been furnishing to said City of Ennis, its inhabitants, and inhabitants of adjacent territory, water from said lakes, claiming the right to do so as assignee of said Morrison, of his rights under the contract and franchise ordinance herein above mentioned, and claiming no other right to do so, and said Ennis water works was so acting, and so furnished water when this suit was instituted on to-wit the 19th day of May, 1909.

V.

I further find that on April 22nd, 1909, the City Council of the City of Ennis passed the ordinance (set out in the 9th, paragraph of plaintiff's first amended petition) which in substance declared null, void and forfeited, the rights and franchises undertaken to be conferred upon A. M. Morrison and his assigns by the franchise ordinance of March 19th, 1900, above spoken of, and the above mentioned contract entered into under the same, claiming that the rights attempted to be conferred by such franchise ordinance and contract, were illegal, and without authority of law, and contrary to the Constitution and laws of this State, and also that such rights had been forfeited because of alleged non-use and mis-user, for the terms and conditions of which ordinance reference is here made to said paragraph 9, of plaintiff's first amended original petition, which for greater certainty shall be considered as copied verbatum in this subdivision of these findings.

44 VI.

I further find that on to-wit, the 15th day of March 1910, the City of Ennis through its City Council enacted a further ordinance set out in paragraph 10, of plaintiff's first amended original petition

herein, declaring in substance that all the franchises and rights claimed by defendant herein A. M. Morrison and Ennis Water Works or either of them, as original grantees or assignees under any ordinance resolution or other act of said City Council, or supposed authority of any contract, or purported contract, based thereon were illegal, without authority, and contrary to the Constitution of the laws of this State, and were forfeited for mis-conduct and mis-user, etc., for the particular terms and conditions of which last named ordinance, reference is here made to paragraph 10 of said first amended original petition, which for identification and terms of the ordinance here referred to, shall be considered as copied verbatum into this paragraph of these findings.

I further find that some time before the institution of this suit, the City of Ennis began the construction of a system of water works of its own, in the course of which it has drilled artesian wells, constructed a reservoir, and done other work towards the construction of an independent water system of its own, and that to meet an emergency caused by depletion of water supply in the City lakes, some time since, the Defendant corporation turned over to the City for its use, in connection with its artesian wells and reservoir, a portion of its distributive system, while it retained the remainder of such system and the City main mentioned in the franchise ordinance and contract, and that through the different portions of the system as thus divided, the City and Defendant, Ennis Water Works, have been supplying, and are now supplying, the City, its inhabitants, and industries with water, partly from said lakes, and partly from said artesian wells, and I further find that in order that the City of Ennis, its inhabitants, and industries may be supplied with the necessary water for domestic use, and for the prevention and extinguishing of fires, and other proper uses it is necessary that this tentative arrangement be continued for a reasonable time, until there is an adequate supply of water in said lakes, or until the City shall have had a reasonable time within which to complete its water system, and I find six months to be a reasonable time for such completion, and that a fair arrangement in this regard is that the City pay $125.00 per month in excess of the rental value of its main, used by the Defendant corporation, for the use of that portion of the plant used by the City, and belonging to such defendant corporation, but this tentative arrangement should be and is, held subject to the further orders of the Court as circumstances may change, and I find this suit to be a legal demand by the plaintiff against the defendant for full restitution of possession and use of all property of the City, the possession or use of which is claimed by the Defendants or either, under the franchise ordinance and contract herein in issue.

VIII.

I find that the defendant, Ennis Water Works has furnished the City of Ennis water for which said City is justly indebted to it, the Ennis Water Works, in the sum of $1,050.00, in excess of all pay-

ments made by the City, or other claim of a pecuniary nature which it has against said Ennis Water Works."

46 *Conclusions of Law.*

From the foregoing facts, I conclude as matters of law:

I.

Plaintiff is entitled to a judgment of forfeiture as prayed for.

II.

Plaintiff is further entitled, for reasonable compensation as fixed in the conclusion of facts, to retain the use of that portion of the distributive plant of Defendant, Ennis Water Works, for the time, and in the manner indicated in the findings of fact, subject to the reserved rights of the Court, to make further orders in respect to the use and possession of such plant, and likewise the Defendant, Ennis Water Works, is entitled to the use of the City's water, main and lakes, without charge, so long as the City uses any portion of its plant, and both parties are entitled to apply to the Court, as circumstances may change, for further orders in this regard.

III.

The Defendant, Ennis Water Works, is entitled to Judgment against Plaintiff, for $1,050.00, and Defendant, A. M. Morrison is entitled to be discharged upon his disclaimer, except as may be necessary to the full adjudication of the forfeiture above adjudged, and no extra costs having been incurred upon the Defendants' re-convention. Plaintiff is entitled to recover cost against Defendant, Ennis Water Works.

To which conclusions of law and fact the Defendant, Ennis Water Works, excepts.

F. L. HAWKINS, *Judge.*

[Endorsed:] #7656. City of Ennis vs. Ennis Water Works et al. Conclusions of law and fact. Filed the 21st day of May, 1910. Amzi Carothers, District Clerk, Ellis County, Texas, by Dan Wilson, Deputy.

47 *Judgment of the Court.*

7656.

CITY OF ENNIS
vs.
ENNIS WATER WORKS.

MAY 14TH, 1910.

This day came the parties by their — and came on to be heard, the exceptions of defendant, general and special, to plaintiff's first

amended original petition and the same having been considered by the Court, the general exceptions and the first, second, and fifth special exceptions of said Defendants are over-ruled, to which ruling Defendants excepted; and the third special exception, and the several sub-divisions thereof, and the fourth special exception of said Defendants were by the Court sustained, to which ruling the Plaintiff excepted.

Thereupon all parties announced ready for trial, and a jury being waived, the matters of fact as well as of law were submitted to the Court, and the Court having heard and considered the pleadings, evidence, and arguments of Counsel, is of the opinion, and so finds, that Plaintiff is entitled to a judgment of forfeiture as prayed for, and to other relief as hereinafter will be adjudged, and that the Defendant, Ennis Water Works on its plea of re-convention herein, is entitled to recover of and from Plaintiff, the City of Ennis, the sum of $1,050.00.

It is, therefore, ordered, adjudged and decreed by the Court, as follows.

1. That all rights, privileges and franchises heretofore claimed and enjoyed by the defendants, Ennis Water Works, a corporation, and A. M. Morrison, or either of them, as assignees transferees or otherwise under and by virtue of grants, licenses, franchises, as well as all contracts made or entered into by the City of Ennis with such Defendants, or either of them, and in this cause sought to be avoided,
48 be and the same are hereby in all things cancelled, vacated, terminated, and for nought held, and that said Defendants, and each of them, be and they are hereby in all things ousted from the enjoyment, use or exercise of such rights, privileges, franchises, licenses, and easements of every character whatsoever.

2. That plaintiff, City of Ennis, do have and recover from the Defendants, and each of them, the right, title and possession of all and singular all property, streets, highways, lanes and alleys, belonging to or under the control of the City of Ennis, under and by virtue of any claim of franchise rights referred to in said pleadings, for which let writs of possession and all other proper process issue in favor of said City of Ennis.

3rd. That the City of Ennis do recover of and from the Defendants, Ennis Water Works and A. M. Morrison, and each of them the title and possession of that certain real estate referred to in Plaintiff's petition and described in the ordinance of March 19th, 1900, to-wit: that certain lot, tract or parcel of land, comprising the reservoir known as the "old lake" situate N. W. of the City of Ennis, being a part of the I. D. Shepherd survey, and adjoining a certain 73 3/10 acre tract of land owned by the H. & T. C. R. R. Co; and the reservoir known as the "New Lake," situate N. W. of the City of Ennis, and being on the same tract of land contracted by the said City of Ennis from Mark Latimer on the 17th day of January, 1905, to which reference is here made for fuller descriptions; together with the rights-of way through all the grounds adjacent to the said lakes and owned by the City, as part of the tracts on which said reservoirs are located, for which writs of possession and all other

proper process may issue for and on behalf of the said City of Ennis.

49 4. That the City of Ennis do recover of and from the Defendants, Ennis Water Works, and A. M. Morrison, all and singular that certain eight inch water main consisting of about eight thousand feet, of cast iron water pipe in service, laid from the pumping station at or near the new reservoir aforesaid to a junction with the water mains belonging to defendants located near the stand pipe in the suburbs of the City of Ennis, for which writs of possession and all other proper process may issue on the application of plaintiff, City of Ennis.

5. That in view of the fact that an urgent public necessity exists for the City of Ennis and its inhabitants to have a reasonable supply of water, in order to use the same for domestic and other uses, and for preventing and extinguishing fires, to maintain sanitary conditions, prevent public injury, the enforcement of this decree and the issuance of process hereunder is stayed for a period of six months from this date. At the expiration of four months from this date the defendants are directed (unless meantime this judgment should be superseded, through process of an appeal taken, or a writ of error sued out by the defendants, or either of them) to commence the removal of their property and effects from the property, streets, highways, lanes and alleys of the City of Ennis according to the directions of this decree, and to complete such removal before the period for the issuance of process hereunder. But in case by appeal or writ of error the final execution of this judgment be suspended for a period of more than six months from this date, then upon the termination of such proceedings of appeal, or writ of error the aforesaid stay shall become inoperative and this decree be forthwith executed by the defendants, or the enforcement thereof proceeded with by the Court under appropriate process.

50 During the time of suspension of process under this decree as above provided, the present temporary possession and use by the City of Ennis of that portion of the water supply system of the defendant corporation now in use by the City and necessary to supply the public with water and to prevent fires, may continue upon condition that the City of Ennis pay to defendant, Ennis Water Works, monthly, or into the registry of this Court for its use, the reasonable value of the use of same, to-wit: the sum of $125.00, and that during such use said defendant corporation may continue to use, without cost to it for rental value, the 9000 feet water mains belonging to said City of Ennis, and take water from said City lakes free of charge. Such temporary arrangement shall in no case continue longer than the time required to build the water supply system being constructed by the City of Ennis, to a condition deemed adequate by it not to exceed the suspension period above named. It may be terminated earlier by order of the Court on application of either party for good cause shown, if before the completion of the City system of water supply, there be gathered in the City lakes and adequate supply of water. This Court reserves the

right to modify this paragraph of this decree at such times and upon imposition of such terms as equity may require.

6. It is further ordered, adjudged and decreed by the Court, that Ennis Water Works, a corporation, do recover of and from the plaintiff, the City of Ennis, the sum of $1,050.00 One Thousand and Fifty Dollars, together with interest thereon from this date at the rate of six per centum per annum, for which let execution issue.

51 7. It is further ordered, adjudged and decreed by the Court, that the costs of suit be and the same are hereby adjudged against the defendant, Ennis Water Works; that plaintiff recover same of and from said defendant, and that to enforce this decree execution and all other proper process may issue. Finally, that the officers of Court do recover of the parties hereto the costs by each respectively incurred.

Except as above adjudged, Defendant A. M. Morrison is hence dismissed upon his disclaimer. The defendant, Ennis Water Works, excepts to the foregoing findings and decree and each and every provision hereof, and plaintiff excepts to the foregoing judgment against it and both parties give notice of appeal to the Court of Civil Appeals for the Fifth Supreme Judicial District, and request the Court to file herein its inclusions of law and fact; on application of the Defendant, Ennis Water Works, supersed-as bond is fixed at Five Thousand Dollars for appeal on writ of error.

52 *Appeal Bond.*

In District Court of Ellis County, Texas.

#7656.

CITY OF ENNIS
vs.
ENNIS WATER WORKS et al.

Whereas on to-wit, the 14th day of May, 1910, in the District Court of Ellis County, Texas, in the above styled and numbered cause, judgment was rendered substantially as follows:

No. 7656.

CITY OF ENNIS
vs.
ENNIS WATER WORKS et al.

MAY 14TH, 1910.

Appeal Bond.

This day came the parties by their attorneys and came on to be heard, the exceptions of Defendant general and special to plaintiff's first amended original petition and the same having been con-

sidered by the Court, the general exception and the first, second, and fifth special exceptions of said defendants are over-ruled, to which ruling Defendants excepted, and the third special exception, and the several sub-divisions thereof, and the fourth special exception of said defendants were by the Court sustained, to which ruling the Plaintiff excepted.

Thereupon all parties announced ready for trial, and a Jury being waived, the matters of fact as well as of law were submitted to the Court, and the Court having heard and considered the pleadings, evidence, and arguments of Counsel, is of the opinion, and so finds that Plaintiff is entitled to a judgment of forfeiture as prayed for, and to other relief as hereinafter will be adjudged, and that the Defendant Ennis Water Works on its plea of re-convention herein, is entitled to recover of and from Plaintiff the City of Ennis, the sum of $1,050.00.

53 It is, therefore, ordered, adjudged and decreed by the Court as follows:

1. That all rights, privileges and franchises heretofore claimed and enjoyed by the Defendants, Ennis Water Works, a corporation, and A. M. Morrison, or either of them, as assignees, transferees or otherwise under and by virtue of grants, licenses franchises, as well as all contracts made or entered into by the City of Ennis, with such Defendants, or either of them, and in this cause, sought to be avoided, be and the same are hereby in all things cancelled, vacated, terminated and for nought held, and that said Defendants, and each of them, be and they are hereby in all things ousted from the enjoyment, use or exercise of such rights, privileges, franchises, licenses and easements of every character whatsoever.

2. That Plaintiff, City of Ennis, do have of and recover from the defendants, and each of them, the right, title and possession of all and singular all property, streets, highways, lanes and alleys belonging to or under the control of the City of Ennis under and by virtue of any claim of franchise rights referred to in the pleadings in this cause, and particularly to those ordinances and contracts set forth in said pleadings, for which let writs of possession and all other proper process issue in favor of said City of Ennis.

3. That the City of Ennis do recover of and from the Defendants, Ennis Water Works and A. M. Morrison, and each of them, the title and possession of that certain real estate referred to in Plaintiff's petition and described in the ordinance of March 19, 1900, to-wit; that certain lot, tract, or parcel of land, comprising the reservoir known as the Old Lake situate N. W. of the City

54 of Ennis, being a part of the I. D. Shepherd survey and adjoining a certain 73-3/10 acre tract of land owned by the H. & T. C. Ry. Co.; and the reservoir known as the New Lake situate N. W. of the City of Ennis and being on the same tract of land contracted by the City of Ennis from Mark Lattimer on the 17th day of January, 1905, to which reference is here made for fuller descriptions; together with the rights-of-way through all the grounds adjacent to the said lakes and owned by the City, as part of the tracts on which said reservoirs are located, for which writs of possession and

all other proper process may issue for and on behalf of the said City of Ennis.

4. That the City of Ennis do recover of and from the Defendants Ennis Water Works and A. M. Morrison all and singular that certain eight inch water main consisting of about eight thousand feet of cast iron water pipe in service, laid from the pumping station at or near the New Lake Reservoir aforesaid to a junction with the water mains belonging to defendants located near the standpipe in the suburbs of the City of Ennis, for which writs of possession and all other proper process may issue on the application of plaintiff, City of Ennis.

5. That in view of the fact that an urgent public necessity exists for the City of Ennis and its inhabitants to have a reasonable supply of water in order to use the same for domestic and other uses, and for preventing and extinguishing fires, to maintain sanitary, conditions, prevent public injury, the enforcement of this decree and the issuance of process hereunder is stayed for a period of six months from this date.

At the expiration of four months from this date the defendants are directed (unless meantime this judgment should be superseded, through process of an appeal taken or a writ of error sued out by the defendants, or either of them) to commence the removal of their property and effects from the property, streets, highways, lanes and alleys of the City of Ennis according to the directions of this decree, and to complete such removal before the period for the issuance of process hereunder. But in case by appeal or writ of error the final execution of this judgment be suspended for a period of more than six months from this date, then upon the termination of such proceedings of appeal or writ of error the aforesaid stay shall become inoperative and this decree be forthwith executed by the defendants, or the enforcement thereof proceeded with by the Court under appropriate process.

55

During the time of suspension of process under this decree as above provided the present temporary possession and use by the City of Ennis of that portion of the water supply system of the defendant corporation now in use by the City, and necessary to supply the public with water, and to prevent fires may continue conditioned that the City of Ennis, pay to the defendant Ennis Water Works monthly or into the registry of this Court for its use the reasonable value of the use of the same, to-wit: the sum of $125.00, and that during such use said defendant corporation may continue to use without cost to it for rental value the eight thousand feet of water main belonging to said City of Ennis, and take water from said City Lakes free of charge. Such temporary arrangements s-all in no case continue longer than the time required to build the water supply system, being constructed by the City of Ennis, to a condition deemed adequate by it, not to exceed the suspension period above named. It may be terminated earlier, by order of the Court on application of either party for good cause shown, if before the completion of the City's system of water supply there be gathered in the City Lakes an adequate supply of water.

56

This Court reserves the right to modify this paragraph of this decree, at such times and upon imposition of such terms as equity may require.

6. It is further ordered, adjudged and decreed by the Court that Ennis Water Works a corporation do recover of and from the plaintiff the City of Ennis, the sum of ($1,050.00) one thousand fifty dollars together with the interest thereon from this date, at the rate of 6% per annum for which let execution issue.

7. It is further ordered adjudged, and decreed by the Court that the costs of suit be and the same are hereby adjudged against the defendant, Ennis Water Works; that plaintiff recover same of and from said defendant, and that to enforce this decree, execution and all other proper process may issue.

Finally that the officers of Court do recover of the parties hereto the cost by each respectively incurred. Except as above adjudged, defendant A. M. Morrison is hence dismissed upon his disclaimer. The defendant Ennis Water Works excepts to the foregoing findings and decree, and each and every provision hereof, and plaintiff excepts to the foregoing judgment against it, and both parties give notice of appeal to the Court of Civil Appeals for the Fifth Supreme Judicial District, and request the Court to file herein its conclusions of law and fact, and on application of defendant, Ennis Water Works supersedeas bond is fixed at $5,000.00, for appeal or writ of error."

And whereas, said Ennis Water Works proposes to appeal from the aforesaid judgment in accordance with its notice, and to suspend execution of the judgment against it, pending such appeal.

57 Now therefore, we, Ennis Water Works as principal and the other undersigned parties as sureties, acknowledge ourselves bound to pay the City of Ennis ($5,000.00,) five thousand dollars conditioned that said Ennis Water Works shall prosecute its said appeal with effect, and in case the judgment of the Supreme Court, or the Court of Civil Appeals, shall be against it, that it shall perform its judgment, sentence or decree, and pay all such damages as said Court may award against it.

Witness our hands and seal this the 31st day of *may*, 1910.

ENNIS WATER WORKS.
By A. M. MORRISON, *Pres.*
A. M. MORRISON.
J. BALDRIDGE.
P. FREEMAN.

Approved this the 31st day of May, 1910.
AMZI CAROTHERS,
District Clerk, Ellis County, Texas.
By DAN WILSON, *Deputy.*

Endorsed: #7656. City of Ennis vs. Ennis Water Works et al. Appeal Bond. Approved and filed May 31st, 1910. Amzi Carothers Dist. Cl'k. Dan Wilson Dept.

58 *Assignment of Errors.*

In District Court of Ellis County, Texas.

#7656.

CITY OF ENNIS
vs.
ENNIS WATER WORKS et al.

Now comes Ennis Water Works, Defendant and Appellant in the above styled and numbered cause, and assigns the following errors therein:

Assignment of Errors.

I.

The Court erred in over-ruling Defendants general exceptions to plaintiff's petition, because the same was insufficient in law to state a cause of action.

II.

The Court erred in overruling defendants 1st and 2nd Special exceptions to Plaintiff's petition, such petition being subject to the objections urged in said exceptions.

III.

The Court erred in overruling Defendants 5th Special exception to Plaintiff's petition, because even if the Hydrant rental agreement was beyond the power of the City Council, this did not make void the entire contract complained of.

IV.

The Court erred in finding from the facts, that Plaintiff was entitled to a judgment of forfeiture as prayed for, and further erred in adjudging a forfeiture of the rights of the Defendant, Ennis Water Works, under the franchise and contract sought to be avoided.

V.

The City of Ennis having repudiated the contract and franchise ordinance sought to be avoided, and the Court, at its instance, having adjudged such ordinance and contract void, the Court erred
59 in awarding the City the possession and use of a portion of the plant of defendant Ennis Water Works, as was done by the decree appealed from, and in assuming to make its own, and a part of its decree, a temporary agreement which, to meet an emergency, was found to exist between Plaintiff and Defendant, Ennis Water Works.

G. C. GROCE,
Att'y for Def't, Ennis Water Works.

Endorsed: #7656. City of Ennis vs. Ennis Water Works et al. Assignment of Errors. Filed the 11th day of August 1910. Amzi Carothers District Clerk, Ellis County, Texas, by Dan Wilson, Deputy.

60 *Bill of Costs.*

THE STATE OF TEXAS:

No. 7656.

CITY OF ENNIS, Plaintiff,
vs.
ENNIS WATER WORKS, Defendant.

Mr. —— ——,

To Officers of Court, Dr., to Costs Accrued in Above-entitled Cause to Adjournment of Feb. Term, 1910.

Revised Civil Statutes.

Art. 1, 422 reads: It shall be lawful for Clerks of the District and County Courts and Justices of the Peace to demand payment of all costs due in each and every case pending in their respective Courts up to adjournment of each term of said Court.

Art. 1, 423, provides: Ten days after such demand the Clerk or Justice may place certified copy of Bill of Costs then due in the hands of Sheriff or Constable for collection, which shall have force and effect of and execution. Taking an appeal does not interfere or suspend the right.

Items and Fees.

Issuing 1 Writ — Citation	.75
Issuing 3 Cop. Writ	1.50
— Cop. Petition with Cert. and Seal	....
Recording Sheriff's Return on Citation	.50
Recording Sheriff's Return on Precept	....
Docketing Complaint and Filing	.35
Docketing — Motion	....
Filing 21 Papers 9	3.15
Entering Appearance	.45
Entering Final Judgment	4.00
Assessing Damages when Case is not tried by Jury	.50
Taxing Costs and Cop. thereof	.25
Entering — Continuance	....
Orders 3	2.25
Swearing — Witnesses	1.00
Issuing 3 Subpœnas 15 ad. names	3.00
Taking — Affidavit	....
6 Certificates of Witness Attendance	3.00
Approving 1 Bonds (except cost)	1.50

Swearing and Impaneling Jury and Recording Verdict	....
Issuing Precept and Copy of Interrogatories	....
Issuing — Commission to take Deposition	....
— Cop. Inter. with Cert. and Seal	....
Issuing — Execution and Return	....
Issuing — Order of Sale and Return	....
Issuing — Writ of Possession	....
Issuing — notice & 2 cops.	1.75
Issuing — Garnishment	....
Issuing — Sequestration	....
Transcript on Appeal to Ct. Civ. Appeals	30.00
Certificate on Brief	....
Issuing Notice of Filing of Brief	....
Total Clerk's Fees	$53.95

Items of Fees.

Serving 1 Writs and Mileage, Sheriff	2.50
Serving 2 Writs and Mileage, Sheriff —— of —— County	3.00
Summoning — Witness and Mileage	....
Serving 1 Notice	3.50
Levying — Writ of Sequestration and Return	....
Serving — Writ of Garnishment	....
Serving — Injunction	....
Executing — Writ of Possession and Return	....
Citation by Publication	....
Jury Fee, if Case tried by Jury	....
Total Sheriff's Fees	$9.00

Witness Fees.

	....
	....
	....
Total Witness Fees	....

Recapitulation.

Attorney's Fee	....
Notary's Fee	....
Printer's Fee	....
Jury Fees	....
Fees of District Clerk	53.95
Sheriff's Fees	9.00
Stenographer's Fees	3.00
Witness Fees	34.00
Total Fees	$100.55

61 *Certificate of Clerk District Court.*

THE STATE OF TEXAS,
County of Ellis:

I, Amzi Carothers, District Clerk in and for Ellis County, Texas, do hereby certify that the foregoing 57 pages contain a true and correct transcript of the proceedings had in cause No. 7656, City of Ennis vs. Ennis Water Works et al. as the same appears of record in my office.

Witness my official signature and seal of office at Waxahachie, this the 17th day of August, A. D. 1910.

AMZI CAROTHERS,
[L. S.] *Clerk of the District Court,*
in and for Ellis Co., Tex.
By DAVE WILSON, *Deputy.*

Endorsed: No. 6349. Ennis Water Works, Appellant, vs. City of Ennis, Appellee. From the District Court of Ellis County. Applied for by G. C. Groce, Attorney for Appellant, on the 31st day of May, 1910, and delivered to G. C. Groce on the 18th day of Aug. 1910. Amiz Carothers, Clerk, District Court Ellis County, Texas. Filed in Court of Civil Appeals, at Dallas, Texas, the 19th day of August, 1910. Geo. W. Blair, Clerk, Court of Civil Appeals 5th Supreme Judicial District of Texas. G. C. Groce, Attorney for Appellant, Waxahachie, Texas., P. O. Address. Spence, Knight, Baker & Harris, Attorneys for Appellee, Dallas, Texas, P. O. Address. No. 2286. 5th Dist. Filed in Supreme Court May 24, 1911. F. T. Connerly, Clerk, by J. S. Myrick, Deputy. Affirmed M'ch 13, 1912. Motion for rehearing overruled May 22, 1912.

62 PROCEEDINGS IN THE COURT OF CIVIL APPEALS, 5TH DISTRICT, AT DALLAS, TEXAS.

Opinion.

Filed March 25, 1911.

No. 6349.

ENNIS WATER WORKS, Appellant,
vs.
CITY OF ENNIS, Appellee.

Appeal from Ellis County.

This suit was brought by the City of Ennis against the Ennis Water Works to forfeit its charter granted to it by said city on the grounds that said city had no express or implied authority to grant such exclusive privileges for the excessively long period of thirty

years; that such franchise was contrary to the provisions of the Constitution, wherein monopolies and perpetuities were prohibited and that defendant had broken the conditions thereof, and its further performance, in part, abandoned by defendant, by reason of which the grant had lapsed.

Defendant answered by general and special demurrers; the general issue and specially set up matters to show the franchise to be valid.

The cause was tried by the court without a jury and judgment of forfeiture rendered, and the Ennis Water Works appeals.

Conclusions of Fact.

There is no material controversy over the finding of fact by the trial court and we adopt the same as our conclusions, as follows:

I.

"That on March 19th, 1900, the City of Ennis was and for years prior thereto had been a duly incorporated city, and municipal corporation, located in Ellis County, Texas, and incorporated as
63 a city under the general laws of this State, and on and prior to that date was exercising its corporate functions in the territorial area authorized by its act of incorporation, and that on that date it had, and still has, a population exceeding five thousand inhabitants, and a corporate area of several square miles; that within its limits are the lines of two systems of railway, viz.: the Houston and Texas Central Railway Company and the Texas Midland Railway Company, and divers cotton gins, an oil mill, divers banks, a mercantile establishments, homes, hotels, and other public institutions.

II.

That on March 19th, 1900, the City of Ennis owned and ever since has owned two large reservoir sites and lakes of impounded water, together with land pertaining thereto, which will be hereinafter referred to as the "New Lake," and the "Old Lake," both more particularly referred to in the franchise ordinance that will be hereinafter mentioned, and which is fully set out in paragraph 3, of plaintiff's first amended original petition, and at the same time said city owned and still owns about 8,000 ft. of valuable cast iron, 8-inch water mains which connected said "New Lake" with a distribution system in said city, then owned by defendant A. M. Morrison. And on said day of March, 1900, the water supply of said City of Ennis and its inhabitants and industries including divers railways, cotton gins, oil mills, business houses, residences, and other institutions of the city, was being taken from the reservoirs above mentioned, and distributed through said distribution system owned by said Morrison, and said lakes and mains were then and are now worth $10,000.

III.

That on March 19th, 1900, the then City Council of the City of Ennis passed an ordinance purporting to give and grant unto defendant A. M. Morrison, his heirs and assigns for a term of thirty years, the right and privilege to supply to the City of Ennis and the inhabitants thereof, and of territory adjacent thereto, *with*
64 water for domestic and other uses, and for preventing and extinguishing fires, under certain terms, conditions and limitations, in such ordinance set out, which said ordinance is fully set out in paragraph 3 of plaintiff's first amended original petition, beginning: "Be it ordained by the City Council of the City of Ennis, Texas, that," etc., and containing fourteen sections, for full contents of which reference is here made to the 3rd. paragraph of plaintiff's first amended original petition herein, to be considered as copied verbatim in these findings, and by such ordinance the Mayor and City Secretary of said City were authorized and directed to enter into a contract with said Morrison according to the terms of said ordinance if accepted by him, and to sign and acknowledge such papers and documents as might be necessary to perfect and carry out such contract.

I further find that said A. M. Morrison accepted the terms and conditions of the ordinance above mentioned, and that on the 22nd day of March, 1900, he for himself and Chas. B. Lewis, Mayor of the City of Ennis, and C. M. Banner, Secretary of said city, for and on behalf of said city entered into a contract in accordance with the terms and conditions of said ordinance which contract is fully set out in the third paragraph of plaintiff's first amended original petition, which embodied said ordinance, and for the terms and conditions of such contract reference is here made to the 3rd. paragraph of plaintiff's first amended original petition herein, which for purposes of greater particularity is considered as being copied verbatim in these findings.

IV.

I further find that immediately following the execution of the contract above mentioned the defendant Morrison proceeded thereunder to furnish water to the City of Ennis, its inhabitants, and the inhabitants of the vicinity of said city, and located upon the lands of the city, divers structures, pumping plants, engine rooms, etc.,
65 the water furnished by him being taken from the above mentioned lakes or reservoirs belonging to the City of Ennis, and that he continued thus to furnish water to said city, its inhabitants, and the inhabitants of the vicinity, until about the 4th day of February, 1901, when by deed of that date he assigned to the defendant, Ennis Water Works, a corporation duly incorporated under the laws of this State, all of his rights under the ordinance and contract above mentioned together with the physical properties which he had erected for use in connection with such contract, and his distribution plant through which such water was being supplied, and since such assignment, said Ennis Water Works has been furnishing to said City of Ennis, its inhabitants, and inhabitants of adjacent territory,

water from said lakes, claiming the right to do so as assignee of said Morrison, of his rights under the contract and franchise ordinance herein above mentioned, and claiming no other right to do so, and said Ennis Water Works was so acting, and so furnished water when this suit was instituted on to-wit, the 19th day of May, 1909.

V.

I further find that on April 22nd, 1909 the City Council of the City of Ennis passed the ordinance set out in the 9th paragraph of plaintiff's first amended petition which in substance declared null, void and forfeited, the rights and franchises undertaken to be conferred upon A. M. Morrison and his assigns by the franchise ordinance of March 19th, 1900, above spoken of, and the above mentioned contract entered into under the same, claiming that the rights attempted to be conferred by such franchise ordinance and contract, were illegal, and without authority of law, and contrary to the Constitution and Laws of this State, and also that such rights had been forfeited because of alleged non-use and mis-user, for the terms and conditions of which ordinance reference is here made to said
66 paragraph 9, of plaintiff's first amended original petition, which for greater certainty shall be considered as copied verbatim in this sub-division of these findings.

VI.

I further find that on to-wit: the 15th day of March, 1910, the City of Ennis through its City Council enacted a further ordinance set out in paragraph 10, of plaintiff's first amended original petition herein, declaring in substance that all the franchises and rights claimed by defendant herein A. M. Morrison and Ennis Water Works or either of them, as original grantees or assignees under any ordinance resolution or other act of said City Council, or supposed authority of any contract, or purported contract, based thereon were illegal, without authority, and contrary to the Constitution of the laws of this State, and were forfeited for mis-conduct and mis-user, etc., for the particular terms and conditions of which last named ordinance, reference is here made to paragraph 10 of said first amended original petition, which for identification and terms of the ordinance here referred to, shall be considered as copied verbatim into this paragraph of these findings.

VII.

I further find that some time before the institution of this suit, the City of Ennis began the construction of a system of water works of its own, in the course of which it has drilled artesian wells, constructed a reservoir, and done other works towards the construction of an independent water system of its own, and that to meet an emergency caused by depletion of water supply in the city lakes, some time since, the defendant corporation turned over to the city for its use, in connection with its artesian wells and reservoir, a portion of

its distributive system, while it retained the remainder of such system and the city main mentioned in the franchise ordinance and contract, and that through the different portions of the system as thus divided, the city and defendant, Ennis Water Works, have been supplying, and are now supplying, the city, its inhabi-
67 tants, and industries with water, partly from said lakes, and partly from said artesian wells, and I further find that in order that the City of Ennis, its inhabitants, and industries may be supplied with the necessary water for domestic use, and for the prevention and extinguishing of fires, and other proper uses it is necessary that this tentative arrangement be continued for a reasonable time, until there is an adequate supply of water in said lakes, or until the city shall have had a reasonable time within which to complete its water system, and I find six months to be a reasonable time for such completion, and that a fair arrangement in this regard is that the city pay $125.00 per month in excess of the rental value of its main, used by the defendant corporation, for the use of that portion of the plant used by the city, and belonging to such defendant corporation, but this tentative arrangement should be and is, held subject to the further orders of the Court as circumstances may change, and I find this suit to be a legal demand by the plaintiff against the defendant for full restitution of possession and use of all property of the city, the possession or use of which is claimed by the defendants or either, under the franchise ordinance and contract herein in issue.

VIII.

I find that the defendant, Ennis Water Works has furnished the City of Ennis water for which said city is justly indebted to it, the Ennis Water Works, in the sum of $1,050.00, in excess of all payments made by the City, or other claim of a pecuniary nature which it has against said Ennis Water Works."

The franchise mentioned in the foregoing conclusions is shown by an ordinance passed by the City Council of the City of Ennis, on March 19th, 1900, and accepted on March 22nd, 1900, which franchise is as follows:

"SEC. 1. The said City of Ennis does hereby give and
68 grant unto A. M. Morrison, a citizen of the City of Ennis, Texas, his heirs and assigns, for the term of thirty years from the date the adoption of this ordinance the right and privilege to supply the City of Ennis and the inhabitants thereof (and of the territory adjacent thereto) with water for domestic and other uses and for preventing and extinguishing fires.

SEC. 2. The said A. M. Morrison, his heirs and assigns, is hereby authorized and empowered to establish, construct, maintain and operate a system of waterworks in or adjacent to the City of Ennis, to receive, take and store, conduct and distribute water throughout said city and adjacent territory; to construct and extend mains and pipes through all the streets, alleys, public grounds and all places under the control of said City of Ennins, and we hereby ratify and approve the location of all machinery, mains and pipes now laid or in use;

to erect and maintain all engines, machinery, and all other appliances necessary for the proper conduct of said waterworks and for the supplying said city and inhabitants thereof, and of adjacent territory, with water for domestic, manufacturing, extinguishing fires and other purposes.

SEC. 3. Said A. M. Morrison shall have the right and is hereby granted the privilege to take up all pavements and side-walks, streets, alleys, lanes or public groves or places and make such excavations therein as may be necessary to lay, repair, and maintain pipes below the surface of the ground for conveying and distributing water as aforesaid; provided, however, that said Morrison shall at a reasonable time replace, repair all such pavements and sidewalks and other property, making them in as good condition as they were before or as nearly so as practicable.

SEC. 4. The City of Ennis hereby contracts with the said A. M. Morrison, his heirs and assigns, and agrees to rent and does
69 rent of him thirty-five (35) double-nozzle fire hydrants, as the same are now located for extinguishing fires, at a rental of Twelve Hundred ($1,200.00) Dollars per annum payable monthly in advance, and the city council for the purpose of providing for the payment of all such hydrant rental shall levy, collect and appropriate annually a sufficient sum of money to cover the amount to become due under this contract.

SEC. 5. At any time the city council shall direct, said A. M. Morrison, his heirs or assigns, shall make extensions to the mains, provided that the amount of such extensions to the mains shall not exceed two thousand (2,000) feet per annum, unless said Morrison, his heirs or assigns, shall consent thereto; and provided further that a double nozzle and steamer connection for hydrant be located on every 1000 cubic feet of such extension, for which hydrants the City of Ennis contracts and agrees with said Morrison, his heirs and assigns, to pay him a rental of Forty ($40.00) Dollars each per annum, payable in the manner, at the same time and by the means provided in the preceding section.

SEC. 6 The said Water Works system shall be maintained in good and efficient working order during the term of this contract, and a pressure shall always be maintained in the mains equal to the pressure which results from eighty (80) feet of water in the standpipe, unless prevented by unavoidable causes; and it is further agreed that the pumping capacity shall be increased from time to time to meet the growth and demands of the City of Ennis.

SEC. 7. The City of Ennis hereby grants to the said A. M. Morrison, his heirs or assigns, the right and privilege to take all the water that may be required for the purpose above enumerated from the reservoirs or lake situated as follows:

70 (1) The reservoir known as the "Old Lake" situated North West of the City of Ennis, Texas, being a part of the I. D. Sheppard survey, and adjoining a certain 73 3/10 acre tract of land owned by the H. & T. C. R. R. Co.

(2) The reservoir known as the "New Lake" situated Northwest of the City of Ennis, Texas, and being on the same tract of land

contracted for by the City of Ennis from Mark Latimer on the 17th day of January, 1895, to which reference is here made for a fuller description; together with the right of way through all the grounds adjacent to said lakes and owned by the city, subject to the contracts heretofore entered into by and between the City of Ennis and the Houston & Texas Central Railroad Company with reference to the use of water by the said Railroad Company out of said lakes. The further privilege is granted to the said Morrison, his heirs and assigns, to enter in and upon said tracts of land upon which said reservoirs are situated and to erect thereon machinery and improvements necessary for the conduct of said water business.

SEC. 8. The City of Ennis in consideration of the sum of Fifty Dollars ($50.00) per month payable to it on the first day of each month in advance hereby lets and leases to the said A. M. Morrison, his heirs and assigns, during the term of this contract about 8000 feet of 8-inch water main belonging to the said City of Ennis and laid be it from the pumping station at said New Lake to a junction with its mains near the stand-pipe.

SEC. 9. The said A. M. Morrison shall furnish water to the citizens of Ennis at a rate not to exceed the average water rates of cities in Texas of population approximately the size of Ennis.

SEC. 10. The City of Ennis reserves to itself the right to acquire by purchase and become the sole owner of said waterworks system at the expiration of five years, or in a period of five years
71 thereafter upon giving twelve months' notice of such intention and upon paying therefor to the owners thereof the value of said property at the time of such purchase. Franchise having been given without consideration not to be valued in this appraisement. And such value shall be ascertained by appraisement, each party to select a disinterested and competent person for that purpose, and if the said appraisers fail to agree they shall select an umpire to act for them, which said umpire shall pass upon the points of disagreement between the two said appraisers.

SEC. 11. Any person or persons who shall wilfully or maliciously injure or destroy any portion of the works, fixtures, or other property belonging or appertaining to said works or constituting a part thereof, or shall wrongfully interfere with or upon any hydrants or waste any water therefrom, or shall take any water from any public or private hydrant, faucet or fixture without the consent of the owners of said Water Works or shall in any way pollute the water supply shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than one dollar nor more than one hundred dollars and costs of prosecution.

SEC. 12. The said A. M. Morrison shall commence the extension of said water works system within four months from the adoption of said ordinance and shall complete the same to the extent of at least two thousand feet within six months thereafter.

SEC. 13. This ordinance shall be a contract by and between the City of Ennis, Texas, and the said A. M. Morrison, his heirs, successors and assigns, and shall be binding upon both parties hereto, provided the said A. M. Morrison shall file with the City Secretary

his acceptance of the same in writing within ten days after the adoption hereof. The Mayor and City Secretary are hereby authorized and directed to sign and acknowledge such paper or papers as may be necessary to bear out any and all parts hereof.

72 SEC. 14. All ordinances or parts of ordinances heretofore passed by the City Council of the City of Ennis, Texas, that are in conflict with or in opposition to this ordinance or any part thereof are hereby appealed."

Opinion.

The pivotal question for decision is: Whether or not the franchise purporting to grant A. M. Morrison the rights and privileges stated therein exclusively tended to the creation of an unlawful monopoly in violation of Art. 1, Section 26 of the Constitution of Texas, prohibiting monopolies and perpetuities?

The lower court evidently based its judgment on the decision of our Supreme Court in the case of Brenham v. Water Co., 67 Tex., 543. The Appellant virtually admits that if the Brenham case is applicable and is followed it settles this case, but it contends that the facts in this case are different from those in the Brenham case, and the conclusion reached in the Brenham case is in conflict with the great weight of authority. The contracts in this and in the Brenham case are very similar, in fact, some of the provisions in each are practically identical. At the time the Brenham contract was entered into the City of Brenham owned no water supply, no water mains, and it seems to have been without any public water accommodations whatever. When the City of Ennis entered into the contract in controversy, it owned a water supply, but owned no distributing plant, except about 8,000 feet of water main. Morrison, one of its citizens, owned a distributing plant with which, through the city mains, its lakes, the source of water supply, were connected and through this joint system the city and its inhabitants were supplied with water. The difference in the conditions existing when the two contracts were entered into do not appear to us as to affect the principle enunciated in the Brenham case. In

73 neither case was the source of supply of water to be obtained confined to any particular stream or lake. While the Ennis Water Works was authorized to use the lakes owned by the City of Ennis, yet there is nothing in the contract that confined it to those lakes for the supply. The difference between the two contracts is immaterial, and so believing, the law enjoins us to follow our own Supreme Court, and should it be conceded that the weight of authority is against the conclusions of the Brenham case, we feel bound to adhere to it, as the law of this case. Said decision has been approved at various times since its rendition by our Supreme Court, and we are not inclined to hold a contrary view. Algelt v. San Antonio, 81 Tex., 448; City of Austin v. Nalle, 85 Tex., 520; Edwards County v. Jennings, 89 Tex., 678; Ins. Co. vs. Houston, 116 S. W., 116.

Appellant's third assignment of error is: "The City of Ennis having repudiated the contract and franchise ordinance sought to be

COPY BOUND

avoided, and the Court, at its instance, having adjudged such ordinance and contract void, the court erred in awarding the city the possession and use of a portion of the plant of defendant Ennis Water Works, as was done by the decree appealed from, and in assuming to make its own, and a part of its decree, a temporary agreement which, to meet an emergency, was found to exist between plaintiff and defendant, Ennis Water Works."

The judgment of the court after awarding forfeiture of the franchise and after directing the discontinuance by appellant of its alleged franchise rights provided: "That in view of the fact that an urgent public necessity exists for the City of Ennis and its inhabitants to have a reasonable supply of water, in order to use the same for domestic and other uses, and for preventing and
74 extinguishing fires, to maintain sanitary conditions, prevent public injury, the enforcement of this decree and the issuance of process hereunder is stayed for a period of six months from this date. At the expiration of four months from this date the defendants are directed (unless meantime this judgment should be superseded, through process of an appeal taken, or a writ of error sued out by the defendants, or either of them) to commence the removal of their property and effects from the property, streets, highways, lanes and alleys of the City of Ennis according to the directions of this decree, and to complete such removal before the period for the issuance of process hereunder. But in case by appeal or writ of error the final execution of this judgment be suspended for a period of more than six months from this date, then upon the termination of such proceedings of appeal, or writ of error, the aforesaid stay shall become inoperative and this decree be forthwith executed by the defendants, or the enforcement thereof proceeded with by the court under appropriate process. During the time of suspension of process under this decree as above provided, the present temporary possession and use by the City of Ennis of that portion of the water supply system of the defendant corporation now in use by the city and necessary to supply the public with water and to prevent fires, may continue upon condition that the City of Ennis pay to defendant, Ennis Water Works, monthly, or into the registry of this court for its use, the reasonable value of the use of same, to-wit: the sum of $125.00, and that during such use said defendant corporation may continue to use, without cost to it for rental value, the 8,000 feet water mains belonging to said City
75 of Ennis, and take water from said city lakes free of charge. Such temporary arrangement shall in no case continue longer than the time required to build the water supply system being constructed by the City of Ennis, to a condition deemed adequate by it not to exceed the suspension period above named. It may be terminated earlier by order of the court on application of either party for good cause shown, if before the completion of the city system of water supply there be gathered in the city lakes an adequate supply of water. This court reserves the right to modify this paragraph of this decree at such times and upon imposition of such terms as equity may require."

While the court adjudged the contract void, it nevertheless, had

CLOSE IN CENTER

the power, in view of the public necessity existing, to suspend its judgment until other arrangements could be perfected for the supply of water. The judgment does not seem to be inequitable to the appellant and we think there was no error therein. Water Co. v. Mobile, 33 L. R. A., 59; Weatherby v. Water Co., 22 So., 140; Electric Co. v. Snoqualime Falls Co., 1 L. R A., 1032 (N. S.).

The judgment is affirmed.

RAINEY,
Chief Justice.

Delivered March 25th, 1911.

Endorsed: No. 6349. Ennis Water Works, Appellant, vs. City of Ennis, Appellee. Opinion by Rainey, Chief Justice. Filed in Court of Civil Appeals Mar. 25, 1911. Geo. W. Blair, Clerk 5th District. With App. No. 7279. Filed in Supreme Court May 15, 1911. F. T. Connerly, Clerk.

76 *Judgment.*

6349.

ENNIS WATER WORKS
vs.
CITY OF ENNIS.

From District Court Ellis County.

SATURDAY, *March 25th*, 1911.

Opinion of the Court delivered by Mr. Rainey, Chief Justice.

This cause came on to be heard on the transcript of the record and the same being inspected, because it is *in* the opinion of the Court that there was no error in the judgment, it is therefore considered, adjudged and ordered that the judgment of the court below be in all things affirmed; that the appellee, City of Ennis, do have and recover of appellant, Ennis Water Works, and A. M. Morrison, B. Baldridge and F. Freeman, its sureties upon appeal bond, all costs in this behalf expended and this decision be certified below for observance.

Motion for Rehearing.

Filed April 8th, 1911.

In the Court of Civil Appeals, Fifth Supreme Judicial District.

No. 6349.

ENNIS WATER WORKS, Appellant,

CITY OF ENNIS, Appellee.

Appeal from District Court of Ellis County.

Appellant's Motion for Rehearing.

Now comes Ennis Water Works, a corporation, Appellant
77 in the above styled cause, by its attorney, and moves the Court to grant a rehearing therein, for the following reasons:

I.

The Court erred in refusing to sustain Appellant's 1st and 2nd Assignments of Error, and in assuming and holding as it has, that, under the facts found, the franchise ordinance in issue in this case conferred, or assumed or intended to confer, on A. M. Morrison and his assigns an exclusive right or privilege to furnish the City of Ennis and its inhabitants with water for domestic, public and other purposes, for the period of time named in such franchise grant.

II.

This Court in its opinion (probably inadvertently) speaks of the franchise grant herein in issue as a "charter", and in the opinion, assumes that the grant in question was, and was intended to be, exclusive in its nature, and says, that the pivotal question for decision is whether the franchise purporting to grant the rights and privileges stated therein exclusively, was in violation of the anti-monopoly clause of our State Constitution. In this the Court erred, because the grant was of a mere franchise, and whether or not it was or was intended to be, exclusive, was the vital question in issue in the case.

III.

The Court erred in refusing to sustain Appellant's 3rd Assignment of error and in holding that the trial court had a right to make the order for the possession and use of Appellant's property after judgment that it did make.

Messrs. Spence, Knight, Baker & Harris, a law firm, all the
78 members of which are residents of the City of Dallas, Dallas County, Texas, are attorneys of record for appellee.

G. C. GROCE,
Attorney for Appellant.

Endorsed: In the Court of Civil Appeals, Fifth Supreme Judicial District. No. 6349. 5461. Ennis Water Works, Appellant, vs. City of Ennis, Appellee. Appellant's Motion for Rehearing. Filed in Court of Civil Appeals Apr. 8, 1911. Geo. W. Blair, Clerk 5th District. Filed in Supreme Court May 15, 1911. F. T. Connerly, Clerk.

Order Overruling Motion for Rehearing.

April 15, 1911.

5461. 6349.

ENNIS WATER WORKS
vs.
CITY OF ENNIS.

SATURDAY, *April 15th*, 1911.

This day came on to be heard the motion of appellant for rehearing of this cause and the same being inspected, it is considered, adjudged and ordered that the said motion be overruled.

79 PROCEEDINGS IN THE SUPREME COURT OF TEXAS.

Application for Writ of Error.

In the Supreme Court of Texas.

ENNIS WATER WORKS, Plaintiff in Error,
vs.
CITY OF ENNIS, Defendant in Error.

Petition for Writ of Error to Court of Civil Appeals for the Fifth Supreme Judicial District.

To the Honorable Supreme Court of the State of Texas:

Your Petitioner, Ennis Water Works, a corporation duly incorporated, hereinafter called Plaintiff in Error, applies for a Writ of Error to the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas, and respectfully shows:

On May 19", 1909, the City of Ennis, a municipal corporation, instituted its suit in the District Court of Ellis County, Texas, to forfeit certain franchise rights to furnish it, and its inhabitants with water, which in March, 1900, it had granted to one A. M. Morrison and his assigns, the right to enjoy which was claimed by Plaintiff in Error, as assignee of said Morrison.

Among other grounds urged for the forfeiture of such franchise, it was charged that the grant in question was exclusive in its nature, and created a monopoly, contrary to prohibitions of the Constitution of this State.

A trial before said District Court, on to-wit, May 14", 1910, resulted in a Judgment of Forfeiture as prayed for, on the ground that the grant was exclusive in its nature, and contrary to the constitutional prohibitions invoked by the Plaintiff in the case.

80 From this Judgment an appeal was prosecuted to the Court of Civil Appeals for the Fifth Supreme Judicial District,

which Court on, to-wit, the 25th day of March, 1911, affirmed the Judgment of said District Court, and afterwards on to-wit, April 15", 1911, over-ruled a motion for re-hearing in said cause, wherein was presented the several matters that will be urged in this Petition.

Your Petitioner insists that said Court of Civil Appeals erred in its holdings and Judgment in said cause, in the following respects:

First Assignment of Error.

The Court of Civil Appeals erred in over-ruling, and in *re* refusing to sustain Appellant's (Plaintiff In Error's) first and second Assignments of Error in said Court, and in holding that under the facts found by it, which were the same that had been found by the trial Court, the Plaintiff below, and Defendant In Error here, was entitled to a Judgment of Forfeiture, as prayed for, and in affirming the Judgment of the Trial Court.

The facts, concerning which there is no controversy, being fully set out in the opinion of the Court of Civil Appeals, the question here, as in said Court of Civil Appeals, is purely of law, and whether the franchise grant sought to be avoided was in fact exclusive in its nature, and violative of the Constitutional provisions invoked.

The Judgments of both the trial Court and Court of Civil Appeals are based on the decision of this Court in the case of the City of Brenham vs. Brenham Water Co. 67 Tex. 542.

We contend, that:

1st. This case differs materially in its facts from the Brenham case, and is not necessarily ruled by it.

2nd. If the Brenham case is to be considered as holding more than that the Judge who rendered the opinion, and who under the then organization of the Court passed on questions of fact as well as of law, found from all the surrounding circumstances, that the
81 parties intended to make an exclusive Contract, and that, being exclusive as a matter of fact, the contract was violative of Constitutional prohibitions, then the case stands solitary and alone, in the jurisprudence of the United States, and of the several States, in its holdings. In other words, no other case can be found in the decisions of our Federal and State Courts which holds, as a matter of law, that language such as was before the Court in the Brenham case confers exclusive rights, while there is an overwhelming array of authority to the contrary. This, we realize, is a strong assertion, but a search of the authorities will prove its truth.

3rd. If the Brenham case is to stand as anything more than a holding that the contract therein in question was, as a matter of fact, exclusive, and meant so to be, and was therefore void, it is in conflict with, and has been practically over-ruled by Federal decisions cited in our Brief, and this case presenting a Federal question, the State Courts should follow the holdings of the Federal tribunals, the final jurisdiction being in them.

The Court of Civil Appeals in its opinion in this case recognizes that there is a conflict between the Brenham case, as they construe its holdings, and the Federal decisions, but say they feel constrained

to follow the Brenham case, because it has been so many times approved.

It is true, as shown in our Brief, that the case has been frequently cited to the proposition, nowhere disputed, that under our constitution grants of exclusive franchises are void, but it has never been cited to the proposition that such language as was then before the Court, when used in connection with different facts, imported an intent to confer exclusive rights.

We are assuming that our Brief will be examined in connection with this application, and for the sake of brevity we are attempting herein to repeat as little of it as possible in order to have this application succinctly state the contentions on which it is based.

82 In our belief we have undertaken to show how this case is distinguishable in its facts from the Brenham case, and we think it, in principle, more like the case of Mahon vs. City of Columbus, 58 Miss. 310, cited on page 4 of the Brief for Appellee (Defendant in Error) wherein the grant of the use of a partial water system by a City, for a considerable term of years was upheld against assaults almost identical with those made upon the Grant in issue in this case.

We contend, in the first place, that it is the duty of the Courts to give to the grant herein in question a construction which will make it legal, if such construction can reasonably be given it, instead of a construction that will make it void, and in our brief attempt to show that it is reasonably susceptible of a construction that will make the Brenham case inapplicable, and why.

In adition to what is stated in the brief in this regard we now call attention to the clause in the first section of the Franchise Ordinance assuming to grant a right to supply water to inhabitants of territory adjacent to the City of Ennis. All portions of the ordinance must be looked to in determining its intent, and all provisions must be given effect, if possible, and the Courts must prefer a construction resulting in legality to one destructive of an ordinance. The City of Ennis could not grant extra territorial rights except in regard to its own property, but it could, in order to gain a water supply to itself and its inhabitants from its own lakes, permit its grantee to also supply from such lakes persons beyond its limits, and this we urge as another circumstance to show that the intent of the ordinance was merely to grant a right to distribute water from the City's lakes.

This case has been determined upon the face of the franchise ordinance alone. There is no finding of fact which will hamper this Court in its conclusions. The Ordinance is susceptible of the construction for which we contend. The attendant facts favor

83 such construction, which would make the ordinance legal, and avoid repudiation and probable confiscation, and in common justice, such construction should prevail. If, however, we must still contend with the Brenham case, then we say that case has been repudiated, and over-ruled by Federal decisions cited in our Brief, and that in this case a Federal question is presented upon which the State Courts should be guided by the Federal Decisions.

If Plaintiff in Error, has rights guaranteed by our Federal Constitution, which are sought to be impaired in violation of such guaranties it is, under the very terms of the Federal Constitution itself, the Supreme Law of the land, as much the duty of this Court to protect it in such rights, as it is of Federal tribunals, and we have the right, which we are now exercising, to appeal to this Court for the protection of such rights, abundantly shown by the facts found, and the decisions cited in our Brief.

Second Assignment of Error.

The Court of Civil Appeals erred in over-ruling, and in refusing to sustain Appellant's (Plaintiff In Error's) Third Assignment of Error in that Court, and in holding that, the City of Ennis, although it had repudiated its franchise ordinance, and sued to cancel it as having always been void, was never-the-less entitled to the enforced use of the plant of Plaintiff in Error, as such use was awarded in the Judgment appealed from, and in affirming the Judgment of the trial Court in that regard.

It may be true, as is held by cases cited in the opinion of the Court of Civil Appeals, that when the State, or a Municipality grants a public service franchise, and the grantee so abuses, or misuses it, or so wilfully neglects to perform contractual duties under it as to warrant its forfeiture, that when the franchise is forfeited for these causes reasonable service to the public by the grantee may be compelled, during a reasonable time after forfeiture, but we deny that a Municipality can repudiate its own contract, and yet demand service under it.

84 This seems to have been the opinion of the Supreme Court of the United States when it said in Farmers Loan & Trust Co. vs. Galesburg, 133 U. S. 176. "It (the city) could not continue after annulling the contract, to receive from the water company water for fire protection."

Certainly, it seems to us, a taking of property without due process of law when a Court, as the trial Court did, actually turns over the property of one person to an adverse litigant, for his use, and service, even if it be for compensation deemed adequate by the Court. The right to take private property for public use, even for compensation, cannot be rightfully exercised as the trial Court assumed to do in this case, and if there is any authority to sustain the judgment appealed from in this regard, save the opinion now sought to be reviewed, we are ignorant of it.

We respectfully ask a Writ of Error to said Court of Civil Appeals of the Fifth District, that its Judgment in this case may be reviewed, revised and corrected.

G. C. GROCE,
Attorney for Plaintiff in Error.

Endorsed: In Supreme Court. Ennis Water Works, Pl't'ff in Error, vs. City of Ennis, D'f't in Error. Application for Writ of Error. To Court of Civil Appeals, Fifth District. Filed in Court

of Civil Appeals May 12, 1911. Geo. W. Blair, Clerk, 5th District. Filed in Supreme Court May 15, 1911. F. T. Connerly, Clerk, By J. S. Myrick, Deputy. Granted. G. C. Groce, Attorney for Plaintiff in Error.

Order Granting Application for Writ of Error.

App. No. 7279.

ENNIS WATER WORKS
vs.
CITY OF ENNIS.

From Ellis Co., 5th District.

MAY 24TH, 1911.

This day came on to be heard the application of Ennis Water Works for a writ of error to the Court of Civil Appeals for the Fifth District, and the same having been duly considered it is ordered that said application be granted and the writ of error issue as prayed for.

Citation.

Issued December 19th, 1911.

The State of Texas to the Sheriff or any Constable of Dallas County, Greeting:

You are hereby commanded, by delivering to City of Ennis,—if found in your County, or to Spence, Knight Baker & Harris, attorneys of record, the accompanying certified copy of this
85 writ, to summons said City of Ennis, to be and appear before the Supreme Court of the State of Texas, now in session at Austin, Texas, on Wednesday, the 17th day of January, 1911, provided this writ shall have been served ten days prior to that time; but if this writ shall not have been so served, then on the first Wednesday next ensuing, ten days after such service, pursuant to a writ of error filed in the Clerk's Office of the Court of Civil Appeals for the Fifth Supreme Judicial District, and issued on the 19th day of December, 1911, wherein Ennis Water Works—is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error should not be corrected, and why speedy justice should not be done to the parties in that behalf. And of this writ, with your action endorsed thereon, make due return within ten days from the date hereof.

Witness, the Hon. T. J. Brown, Chief Justice of the Supreme Court of Texas, the 19th day of December in the year of our Lord one thousand nine hundred and Eleven.

F. T. CONNERLY, *Clerk*,
By J. S. MYRICK, *Deputy*.

Endorsed: In Supreme Court. Ennis Water Works vs. City of Ennis. Citation. Issued December 19th, 1911. F. T. Connerly, Clerk Supreme Court. By J. S. Myrick, Deputy. Sheriff's Return. Received Dec. 20, 1911. Executed Dec. 20, 1911, by delivering to the within named Spence, Knight, Baker & Harris by serving W. Spence, the accompanying certified copy of this writ. B. F. Brandenburg, Sheriff of Dallas County. By A. F. Gross, Deputy. Fees, Ser. 1 copy .75¢, Mile .10¢—.85¢.

Order of Submission.

No. 2286.

ENNIS WATER WORKS
vs.
CITY OF ENNIS.

From Ellis County, 5th District.

Submitted upon briefs and orally for both parties.

Opinion.

Filed March 13th, 1912.

No. 2286.

ENNIS WATER WORKS, Plaintiff in Error,
vs.
CITY OF ENNIS, Defendant in Error.

From Ellis County, Fifth District.

This suit was instituted by the City of Ennis, a municipal corporation, on May 19th, 1909, against Ennis Water Works, a
86 private corporation, and A. M. Morrison, a citizen of Ellis county, to cancel and annul a certain contract, ordinance and franchise entered into and granted on March 19, 1900, by the City of Ennis with and to the defendant, Morrison, who transferred all his rights under said contract, ordinance and franchise grant to his co-defendant, Ennis Water Works, and to cancel and annul all subsequent ordinances and contracts entered into by said City with either of said Defendants. The contract sought to be cancelled and annulled pertained to a water works system for said City and its citizens, and the action was in addition to such cancellation and annulment to require the defendants within a reasonable time to remove their service pipes from the public streets, alleys and highways of the City of Ennis, and to vacate their use of the city's property, streets, alleys and highways and to require the defendant, Ennis Water Works, for a reasonable time after such final decree, in

case the city resumed its possession of the service pipes in use by it in its service to its own citizens, to render the water service essential to the health and safety of the inhabitants of the city of Ennis, pending the completion by the City of its municipal water plant in course of construction.

The grounds upon which the city of Ennis based its action, seeking to cancel and annul the contract entered into with the defendant, Morrison, and by him assigned to the defendant, Ennis Water Works, in addition to the alleged failure to comply with certain conditions of the contract and partial abandonment of it by defendants, are summarized in plaintiff's amended petition upon which the trial proceeded, as follows:

"*a.* Because the city of Ennis was without lawful authority to grant unto the said A. M. Morrison a franchise of the tenor
87 described having duration of thirty years, such duration being unreasonable, tending to create a perpetuity and embarrass the city of Ennis in the exercise of its governmental and municipal functions.

"*b.* The city of Ennis was without authority to grant a franchise of the tenor set forth, purporting to lease public property to a private individual for private gain, and purporting to grant to such private individuals for private gain easements in and upon the public property, streets, alleys and highways of the city of Ennis.

"*c.* The city of Ennis was without authority to grant a franchise of the tenor described, because same purports to create in the grantee a monopoly, perpetuity and exclusive and uncontrol-able right, privilege and benefit, contrary to the inhibition contained in Article I, section 26, of the Constitution of the State of Texas, which provides 'Perpetuities and monopolies are contrary to the genius of free government, and shall never be allowed,' and contrary to Article I, section 3 of said constitution.

"*d.* The city of Ennis was without authority to grant a franchise of the tenor described, for that, same creates, or tends to create a monopoly and a perpetuity, a grant of unreasonable duration and one unreasonable, prejudical and hampering the city of Ennis in the exercise of the functions imposed upon it by law for the benefit of its inhabitants.

"*e.* The city of Ennis was without authority to enter into the alleged contract, because same constituted an attempt on the part of the city to surrender and barter away, and on the part of the said Morrison to obstruct the legislative discretion imposed by law upon the city for the benefit of its inhabitants.

"*f.* The city was without lawful authority to grant a franchise of the tenor described, because the same would have the neces-
88 sary effect of limiting the legislative authority and discretion of succeeding lawmaking bodies of the city of Ennis, and embarrassing them in the exercise of that discretion which by law is imposed upon the lawmaking bodies of such municipalities."

The defendant, Ennis Water Works, answered by general demurrer, special exceptions, general denial and certain special pleas to show the contract valid. In addition to the foregoing pleas said

defendant pleaded in reconvention the indebtedness of the City of Ennis to it for services performed under the contract and accepted by said City in the sum of $1,031.00 for which judgment was asked. The defendant, Morrison, disclaimed any interest under the alleged contract, further than as a stockholder in said Ennis Water Works. The cause was submitted to the court without a jury and judgment rendered for the city of Ennis, cancelling and annulling the contract together with the grant of franchise and all rights accorded thereby, and a recovery of all the property held by defendant belonging to the city of Ennis together with the possession of all streets, alleys and highways, lakes and water mains, etc. and in favor of the defendant, Ennis Water Works, against the city of Ennis for $1,050.00. The judgment, in addition to making proper provision for the removal of the property owned by the Ennis Water Works, contained the following provisions.:

"During the time of suspension of process under this decree as above provided, the present temporary possession and use by the city of Ennis of that portion of the water supply system of the defendant corporation now in use by the city and necessary to supply the public with water and to prevent fires, may continue upon condition that the city of Ennis pay to defendant, Ennis Water Works, monthly, or into the registry of this court for its use, the reasonable value of the use of same, to-wit, the sum of $125.00."

The cause was dismissed as to the defendant, Morrison, upon his disclaimer.

89 Upon appeal to the Court of Civil Appeals of the Fifth District the judgment of the trial court was on March 25, 1911, affirmed.

The trial court found the following facts which were adopted by the Court of Civil Appeals and about which there seems to be no contention:

"1. That on March 19, 1900, the City of Ennis was and for years prior thereto had been a duly incorporated city, and municipal corporation, located in Ellis county, Texas, and incorporated as a city under the general laws of this State, and on and prior to that date was exercising its corporate functions in the territorial area authorized by its act of incorporation, and that on that date it had and still has a population exceeding 5,000 inhabitants, and a corporate area of several square miles; that within its limits are the lines of two *lines of two* systems of railway, namely, the Houston & Texas Central Railway and the Texas Midland Railway Company and divers cotton gins, an oil mill, divers banks, mercantile establishments, homes, hotels and other public intsitutions.

"2. That on March 19, 1900, the city of Ennis owned and ever since has owned two large reservoir sites and lakes of empounded water, together with land pertaining thereto which will be hereafter referred to as the "New Lake" and the "Old Lake," and at the same time the said city owned and still owns about 3,000 feet of valuable cast-iron, 8 inch water main, which connected said 'new lake' with a distribution system in said city, then owned by defendant, A. M. Morrison. And on said day of March, 1900, the water supply of said

city of Ennis and its inhabitants and industries including divers railways, cotton gins, and oil mills, business houses, residences and other institutions of the city, was being taken from the reservoirs above mentioned and distributed through said distribution system owned by said Morrison, and said lakes and mains were then and are now worth $10,000.00.

90 "3. That on March 19, 1900, the then city council of the city of Ennis passed an ordinance purporting to give and grant unto defendant, A. M. Morrison, his heirs and assigns for a term of 30 years the right and privilege to supply *to* the city of Ennis and the inhabitants thereof and for territory adjacent thereto, with water for domestic and other uses, and for preventing and extinguishing fires, under certain terms, conditions and limitations, in such ordinance set out, and by such ordinance the mayor and the city secretary of said city were authorized and directed to enter into a contract with said Morrison according to the terms of said ordinance if accepted by him, and to sign and acknowledge such papers and documents as might be necessary to perfect and carry out such contract. I further find that said A. M. Morrison accepted the terms and conditions of the ordinance above mentioned, and that on the 22nd day of March, 1900, he for himself and Charles B. Lewis, mayor of the city of Ennis, and C. M. Banner, secretary of said city, for and on behalf of said city entered into a contract in accordance with the terms and conditions of said ordinance.

"4. I further find that immediately following the execution of the contract above mentioned the defendant, Morrison, proceeded thereunder to furnish water to the city of Ennis, its inhabitants, and the inhabitants of the vicinity of said city, and located upon the lands of the city, divers structures, pumping plants, engine rooms, etc., the water furnished by him being taken from the above mentioned lakes or reservoirs belonging to the city of Ennis, and that he continued thus to furnish water to said city, its inhabitants, and the inhabitants of the vicinity, until about the 4th day of February, 1901, when by deed of that date he assigned to the defendant, Ennis Water Works, a corporation duly incorporated under the laws
91 of this State, all of his rights under the ordinance and contract above mentioned together with the physical properties which he had erected for use in connection with such contract, and his distribution plant through which such water was being supplied, and since such assignment, said Ennis Water Works has been furnishing to said city of Ennis, its inhabitants, and the inhabitants of adjacent territory, water from said lakes, claiming the right to do so as assignee of said Morrison, of his rights under the contract and franchise ordinance hereinabove mentioned, and claiming no other right to do so, and said Ennis Water Works was so acting, and so furnished water when this suit was instituted on to-wit, the 19th day of May, 1909.

"5. I further find that on April 22, 1909, the city of Ennis passed the ordinance which in substance declared null, void and forfeited, the rights and franchises undertaken to be conferred upon A. M. Morrison and his assigns by the franchise ordinance of March 19,

COPY BOUND C

1900, above spoken of, and the above mentioned contract entered into under the same, claiming that the rights attempted to be conferred by such franchise ordinance and contract, were illegal, and without authority of law, and contrary to the constitution and laws of this state, and also that such rights had been forfeited because of alleged non-user and mis-user.

"6. I further find that on the 15th day of March, 1910, the city of Ennis through its city council enacted a further ordinance declaring, in substance, that all the franchises and rights claimed by defendant herein, A. M. Morrison, and Ennis Water Works, or either of them, as original grantees, or assignees under any ordinance, resolution, or other acts of said city council, or supposed authority of any contract or purported contract, based thereon, were illegal, without authority, and contrary to the constitution and of the laws of this State, and were forfeited for misconduct and mis-user, etc.

"7. I further find that sometime before the institution of
92 this suit, the city of Ennis began the construction of a system of water works of its own, in the course of which it has drilled artesian wells, constructed a reservoir, and done other work towards the construction of an independent water system of its own, and that to meet an emergency caused by depletion of water supply in the city lakes, some time since, the defendant corporation turned over to the city for its use, in connection with its artesian wells and reservoir, a portion of its distributive system, while it retaned the remainder of such system and the city main mentioned in the franchise ordinance and contract, and that through the different portions of the system as thus divided, the city and defendant, Ennis Water Works, have been supplying, and are now supplying, the city, its inhabitants, and industries with water, partly from said lakes and partly from said artesian wells, and I further find that in order that the city of Ennis, its inhabitants, and industries may be supplied with the necessary water for domestic use, and for the prevention and extinguishing of fires, and other proper uses it is necessary that this tentative arrangement be continued for a reasonable time, until there is an adequate supply of water in said lakes, or until the city shall have had a reasonable time within which to complete its water system, and I find six months to be a reasonable time for such completion, and that a fair arrangement in this regard is that the city pay $125.00 per month in excess of the rental value of its mains, used by the defendant corporation, for the use of that portion of the plant used by the city, and belonging to such defendant corporation, but this tentative arrangement should be and is held subject to the further orders of the court as circumstances may change, and I find this suit to be a legal demand by the plaintiff against the defendant for full restitution of possession and use of all property of the city,
93 the possession or use of which is claimed by the defendants or either, under the franchise ordinance and contract herein in issue.

"8. I find that the defendant, Ennis Water Works, has furnished the city of Ennis water for which said city is justly indebted to it, the Ennis Water Works, in the sum of $1,050.00, in excess of all

CLOSE IN CENTER

payments made by the city, or other claims of a pecuniary nature which it has against said Ennis Water Works."

Upon the foregoing findings of fact the trial court held that the contract in issue should be forfeited as prayed for.

It will not be necessary to a thorough understanding of the questions involved in this controversy to set out in full the contract entered into by and between the city of Ennis and A. M. Morrison, as authorized by the city council of the city of Ennis, and we will only reproduce such portions of said contract as we think will fairly give a comprehensive understanding of the points decided herein.

Those sections of the contract thought to be essential to a proper understanding of the questions involved are as follows:

"SEC. 1. The said City of Ennis does hereby give and grant unto A. M. Morrison, a citizen of the City of Ennis, Texas, his heirs and assigns, for the term of thirty years from the date of the adoption of this ordinance the right and privilege to supply the City of Ennis, and the inhabitants thereof (and of the territory adjacent thereto) with water for domestic and other uses and for preventing and extinguishing fires."

"SEC. 2. The said A. M. Morrison, his heirs or assigns, is hereby authorized and empowered to establish, construct, maintain and operate a system of water works in or adjacent to the City of Ennis, to receive, take and store, conduct and distribute water through said City and adjacent territory; to construct and extend mains and pipes through all the streets, alleys, public grounds and all places under the control of said City of Ennis, and we hereby ratify and
94 approve the location of all machinery, mains and pipes now laid or in use; to erect and maintain all engines, machinery and all other appliances necessary for the proper conduct of said water works and for supplying said City and the inhabitants thereof and of adjacent territory, with water for domestic, manufacturing, extinguishing fires and other purposes.

"SEC. 4. The City of Ennis hereby contracts with the said A. M. Morrison, his heirs and assigns, and agrees to rent and does rent of him thirty five (35) double-nozzle fire hydrants, as the same are now located for extinguishing fires, at a rental of Twelve Hundred ($1200.00) Dollars per annum payable monthly in advance; and the City Council for the purpose of providing for the payment of all such hydrant rental shall levy, collect and appropriate annually a sufficient sum of money to cover the amount to become due under this contract.

"SEC. 5. At any time the City Council shall direct, said A. M. Morrison, his heirs or assigns, shall make extensions to the mains provided that the amount of such extension shall not exceed two thousand (2,000) feet per annum unless said Morrison, his heirs or assigns, shall consent thereto; and provided further that a double nozzle and steamer connection fire hydrant shall be located on every 1,000 feet of such extension, for which hydrants the City of Ennis contracts and agrees with said Morrison, his heirs and assigns to pay him a rental of Forty ($40.00) Dollars each per annum, payable

in the manner, at the same time and by the means provided in the preceding section.

"SEC. 7. The City of Ennis hereby grants to the said A. M. Morrison, his heirs or assigns the right and privilege to take all the water that may be required for the purposes above enumerated from the reservoirs or lake situated as follows:

"(*a*) The reservoir known as the 'old Lake' situated North-
95 west of the City of Ennis, Texas, being a part of the I. D. Sheppard survey and adjoining a certain 73 3/10 acre tract of land owned by the H. & T. C. R. R. Co.

"(*b*) The reservoir known as the 'New Lake' also situated North West of the City of Ennis, and being on the same tract of land contracted for by the City of Ennis from Mark Latimer on the 17th day of January, 1895, to deed to which reference is here made for a fuller description.

"Together with the right of way through all the grounds adjacent to said lakes and owned by the City, subject to the contracts heretofore entered into by and between the City of Ennis and the Houston and Texas Central Railroad Company with reference, to the use of water by the said Railroad Company out of said lakes.

"The further privilege is granted to the said Morrison, his heirs and assigns to enter in and upon said tracts of land upon which said reservoirs are situated and to erect thereon machinery and improvements necessary for the conducting of said water business.

"SEC. 8. The City of Ennis in consideration of the sum of Fifty ($50.00) per month payable to it on the first day of each month in advance hereby lets and leases to the said A. M. Morrison his heirs and assigns, during the term of this contract about 8,000 feet of 8 inch water main belonging to the said City of Ennis and laid by it from the pumping station at said New Lake to a junction with his mains near the standpipe.

"SEC. 9. The said A. M. Morrison shall furnish water to the citizens of Ennis at a rate not to exceed the average of water rates of Cities
96 in Texas of population approximately the size of Ennis.

"SEC. 10. The City of Ennis reserves to itself the right to acquire by purchase and become the sole owner of said water works system at the expiration of five years, or in periods of five years thereafter upon giving twelve months notice of such intention and upon paying therefor to the owners thereof the value of said property at the time of said purchase. Franchise having been given without consideration not to be valued in this appraisement. And such value shall be ascertained by appraisement, each party to select a disinterested and competent person for that purpose, and if the said appraisers fail to agree they shall select an umpire to act with them, which said umpire shall pass upon the points of disagreement between the two said appraisers."

It is assigned as error, "that the Court of Civil Appeals erred in holding that under the facts found by it, which were the same that had been found by the trial court, the defendant in error was entitled to a judgment of forfeiture, as prayed for and in affirming the judgment of the trial court".

The questions presented for decision are purely of law. The

LOSE IN CENTER

contract itself is so similar in its terms and language to the contract in the case of the City of Brenham v. Brenham Water Works Company, 67 Tex. 542, that we can say with accuracy there is no substantial difference in the two contracts, except in respect to the length of time they were to exist, and the ceding of certain substantial rights and privileges under the present contract not contained in the Brenham contract.

If this court is to adhere to the holding in the Brenham case then we are forced to the conclusion that the judgment of the Court of Civil Appeals should be affirmed, for there is no possible theory upon which this case can be distinguished from the Brenham
97 case. This statement will receive verification by a comparison of the two contracts, as set out in the opinions in the two cases.

The Brenham case upon the questions arising in this case is the leading authority in this State, and since its rendition not only has it been approved in its announcement of the general principle that contracts by municipalities granting exclusive rights and privileges for long periods of time are contrary to the constitution and general policy of the law of this state, but also it has been approved as announcing a correct rule of construction placed upon specific language. To such an extent has that case been cited, discussed and approved, not only in relation to the general principles of law announced against monopolies and perpetuities, but as to the legal effect to be given the language in which the contract is couched that we are not willing to say the interpretation there given the language granting the right and privilege for a great length of time to furnish and supply the city and its inhabitants with water has not become, at least in this jurisdiction, a rule of construction worthy to be observed and adhered to.

The doctrine in the Brenham case has been cited with approval by this court in the following cases: Altgelt v. City of San Antonio, 81 Tex. 436; City of Austin, v. Nalle, 85 Tex. 520; Edwards County v. Jennings, 89 Tex. 621, and Hartford Fire Insurance Co. v. City of Houston, 116 S. W. 36.

It is worthy of note that the personnel of the court was partially changed in each of these cases from what it was when the Brenham case was decided. This observation is made in view of the insistency of learned counsel for plaintiff in error that the Brenham
98 case stands alone in its enunciation of legal principles relating to constitutional and contractual construction.

It is desirable to state that we recognize the well established rules of statutory construction, which are in a sense applicable in construing contracts, to the effect that if such statute is susceptible of two constructions, one of which places it in opposition to and the other in harmony with the constitution, the latter should be adopted. (State v. G. H. & S. A. Ry. Co. 100 Tex., 153; Texas Cen. R. R. Co. vs. Marrs, 100 Tex. 530; Morgan Bros. v. M. K. & T. Ry. Co. of Tex., 110 S. W., 985) and that the grants of public rights by municipalities to individuals are to be strictly construed in favor of the public as against the individual, and that an exclusive grant will not be implied unless given by express terms or by clear implication.

(Stine v. Greenville Water Supply Co., 141 U. S. 67; and City of Vicksburg v. Vicksburg Water Co. 202 U. S. 553.)

We do not think the application of these rules of construction to the contract under investigation will warrant the conclusion that the contract entered into by the City of Ennis with Morrison is not exclusive in its terms, and therefore not obnoxious to the constitution, Section 26, Article I, that "perpetuities and monopolies are contrary to the genius of a free government, and shall never be allowed".

We deem it unnecessary to discuss the proposition that if the contract in question is by its terms necessarily exclusive and grants the right and privilege to the water works company to supply the city of Ennis and its inhabitants with water for the period of thirty years with no power in the city to grant to others the right to compete in supplying is inhabitants with water, or to exercise its legislative authority to furnish water for its own use and the use of its citizens, it would be repugnant to the constitutional provision of this state, as above quoted. Whatever may be the law of other states, it is indisputably the settled policy of this state that monopolies and perpetuities shall not exist under sanction of law. It is therefore the duty of our courts to strike down with mailed hands every contract whether granted under legislative or in the exercise of municipal authority, where exclusive rights and privileges are granted to the inconvenience or detriment of the public interest. We are not called upon to defend the wisdom or the policy of our law in its condemnation of monopolies, and it is enough to say that the business of the world in its general operation has created a difference in commercial standing which has been produced more from monopolistic advantages secured by favor or inadvertence than by skill, industry or any other economical principle known to man.

99

The main question then for our determination is whether or not the contract, the subject of this investigation, by its express terms or by necessary and clear implication, grants the exclusive right and privilege to the water works company to furnish or supply water to the city of Ennis and its citizens for a period of thirty years. If it does, it is void, otherwise it is valid.

We are not able to appreciate the criticism aimed at the opinion of that most accomplished and profound jurist, Judge Stayton, in the Brenham Case, that it stands solitary and alone in the judicial realm of this country. It does not, as we think, stand alone in the sense that any court of last resort in this country has ever announced a doctrine contrary to that stated in that opinion. So far as we have been able to ascertain from a most diligent search and examination of both text books and cases, we have found no authority announcing a doctrine countrary to that of the Brenham case where the contract was the same and a constitutional or statutory provision existed against monopolies and perpetuities as in this state, except the opinion of Judge Pardee in the case of Bartholomew v. City of Austin, 85 Fed. Rep. 359, and the statement of Judge Taft in his opinion in the case of Cunningham v. City of Cleveland, 98 Fed. Rep. 657, that he would not follow the Brenham case in the event the case he was considering was not distinguishable from it.

100

It is significant that in the only case where a contrary doctrine to

that of the Brenham case has been declared, no analysis of the contract has been made in the opinion and no substantial ground given why the language of the contract does not import the existence of an exclusive grant of rights and privileges. The statement, unsupported by reason, is made that there is nothing in the contract to prevent the city of Austin from granting the right to others to lay mains and pipes in the streets and alleys of the city for the purpose of selling water to its citizens. This is true of all the other cases to which reference has been made in the able and exhaustive brief of plaintiff in error's learned counsel, and in the cases referred to in the opinion of Judge Pardee, except the three cases of the City of Brenham, the City of Austin and the City of Ennis. These three cases are distinguishable from all the other cases in the fact that in addition to the grant of the right to lay pipes and mains in all streets and alleys of the city for the purpose of furnishing water to the city and its inhabitants, which does not deny the authority to grant a similar right to other citizens, it grants for the specified period "the right and privilege to supply the city and its inhabitants with water for domestic and other uses and for the purpose of extinghishing and preventing fires." This latter clause is the distinguishing feature of the three cases named from all the other cases to which citation has been made.

101 It is reasonable to assume the contracting parties had some purpose in the provision in the case at bar as set out in section 1, as giving some additional force to the other section granting the right to the use of the streets for the construction of a water works system and its equipage for the purpose of selling water to the city and its inhabitants. If no exclusive right and privilege was intended to be given by the contract, then the section granting the right to the streets and alleys of the city in which to construct and equip a system of water works for the purpose of selling water to the city and its citizens was complete, and there arose no necessity for the other provision granting "for the term of thirty years, the right and privilege to supply the city of Ennis and the inhabitants thereof with water for domestic and other uses and for the purpose of extinguishing and preventing fires."

The right to sell water to the inhabitants of the city of Ennis and to the city was a natural and inherent right in Morrison, as it existed in every other citizen, and no authority to exercise that right was required to be secured from the city of Ennis, but *as* the exercise of the right to use the streets and highways of the City for the purpose of delivering the water he had the inherent right to sell was another question. The contract with Morrison giving him the right to lay his water mains and pipes in the streets of the city of Ennis was valid as such right was not in any sense exclusive. There is nothing in this grant to prevent the city from making a similar grant to any other citizen who might apply for such right. The contract, however, does not stop with the grant of franchise to use the streets and alleys for laying mains and pipes for the pur-

102 pose of conducting water to be furnished the city of Ennis and its inhabitants. It goes further and in addition to the

grant of franchise grants the right and privilege to Morrison, his heirs and assigns, for the term of thirty years "to supply the City of Ennis and the inhabitants thereof with water for domestic and other uses and for preventing and extinguishing fires." The additional grant and the right and privilege to supply the city and its inhabitants with water, taken in connection with the specific language used, imports necessarily the idea of exclusiveness. What authority would remain to the City of Ennis if this contract was valid to grant to any other citizen the right to lay mains and pipes in the streets of Ennis for the purpose of furnishing or selling water to its citizens? Could it not be successfully contended by the water works company, as assignee of Morrison, that under contract the city of Ennis had granted it the right to supply such city with water and therefore there exists no authority to give such right to another. Would it be a sufficient answer to say, you were by the terms of the contract simply given the right to construct a system of water works in the streets and highways of the city of Ennis for the purpose of enabling you to deliver water to those to whom you have contracted to sell water, and the further right and privilege was given you by the contract to sell water to the city and its inhabitants for the term of thirty years. It seems to us clearly this contention would not be tenable. The water works company would answer with a perfect defense, that it is otherwise "nominated in the bond," since the right to sell water to the citizens of Ennis was a natural and inherent right not subject to license and not required to be granted by the city.

Construing this contract we think it is not only essential but proper to consider the peculiar language used by the contracting parties.

However, we do not feel called upon to enter into any further
103 discussion of the subject of the nature of the contract in this case, as it has been construed by the Brenham case, which authority has stood the acknowledged law of this state for twenty-five years. At the time the contract in the case at bar was entered into the Brenham case had been promulgated for over thirteen years and had been approved by all of the cases heretofore cited. It had placed upon a similar contract a rule of construction, and announced the general policy of the law of this state that was well known to its general people. No rights could have innocently accrued to the plaintiff in error demanding a change of the law to meet a great and imperative necessity. If a harsh rule of construction had been announced, it was not placed under a bushel but set upon a hill. Such contract had been declared repugnant to the constitution, and the provisions of that instrument declaring monopolies and perpetuities contrary to the genius of a free government had received a definite construction.

It is urged that this court should overrule the Brenham case, and we are admonished that the courts of the United States will not follow the ruling of this court if the Brenham case is held to be the rule of construction as to the case at bar and are referred to the Bartholomew case. The contract in that case, it is true, was very similar to that in the Brenham and in the case at bar, and while the Circuit Court of Appeals refused to follow the Brenham case, such

refusal was based upon the fact that the contract with the City of Austin by Bartholomew had been in force for five years and bonds had been issued and floated, secured by a lien of the water works before the decision in the Brenham case had appeared. The position there assumed by Judge Pardee is not without great force and does not in the slightest degree indicate a want of due regard for the rulings of this court upon questions of local state policy and state constitutional construction. The same reasoning, however, for not following the Brenham case in the Bartholomew case does
104 not exist here, for when the city of Ennis contract was entered into the rule in the Brenham case as heretofore stated had existed for a period of thirteen years and was at that time well known to the bar of Texas.

We desire to quote from the opinion of Judge Pardee for the purpose of showing the principal reason why the ruling in the Brenham case was not followed by the United States Circuit Court of Appeals: "There is a long line of cases that affirm the independence and freedom of contracts like the one under consideration from the objection that they *avoid* because a supposed monopoly is embodied in them, and many are cited in the briefs; but a review of them is not essential to illustrate our views, which are that the contract forming the bases of the plaintiff's action in this case cannot and ought not to be construed as in any just sense granting an obnoxious exclusive privilege, or as granting to the city water company any monopoly inhibited either by public policy or by the provisions of the constitution of the state of Texas, wherein it is declared that 'perpetuities and monopolies are contrary to the genius of free government, and should never be allowed.' Ordinarily this would be conclusive in this case, but we find that five years after the rights in question were granted to the city water company, under a general state of the law that such contracts were meritorious and valid, and after the induced and necessary capital had been invested, the works organized and accepted by the city of Austin, and negotiable bonds had been floated on the market, secured by mortgage on said works, with the direct consent of the city of Austin, as evidenced by the provisions of the contract, the Supreme Court of State of Texas, in the city of Brenham v. Brenham Water Company, 67 Tex. 542, in dealing with a contract in all material respects similar to the one involved in this case, held that, although no exclusive privi-
105 lege was in terms granted, yet necessarily the effect of the contract was to grant an exclusive privilege, and, further, that the contract thus necessarily granting an exclusive privilege was the granting of a monopoly, in violation of the constitution of the State of Texas. The opinion filed in the case by the learned Supreme Court was very elaborate, and purports to review the general jurisprudence on the subject; but for the reasons hereinbefore given, with all respects, we are compelled to differ from the reasoning and conclusion of the court."

It is contended that the Brenham case has been overruled by the case of Walla Walla v. Walla Walla Water Co., 172 U. S. 1. We do not think this is true. That case is not analogous to the Brenham

case nor to the case at bar. From the statement of Mr. Justice Brown in the Walla Waller case the grant of the City of Walla Walla to the Water Company was in these words: "The right to lay, place and maintain all necessary water mains, pipes, connections and fittings in all the highways, streets and alleys of said city, for the purpose of furnishing the inhabitants thereof with water." This grant was for twenty-five years, but under direct legislative authority granting the city in its charter such power with the proviso that such rights or privileges should "not be exclusive, nor prevent the council from granting the same right to others." The grant in the case at bar and in the Brenham case is as has been shown more than a grant to lay pipes in the streets for periods of twenty-five and thirty years, to furnish water to the city and its inhabitants, but there is a special grant of the right and privilege to supply those cities
106 and their inhabitants with water for those periods. Justice Brown in the Walla Walla case distinguished that from the Brenham case as is evident from the following language made use of by him: "Had the privilege granted been an exclusive one, the contract might be considered objectionable upon the ground that it created a monopoly without an express sanction of the legislature to that effect. It is true that in City of Brenham v. Brenham Water Co., 67 Tex. 542, a city ordinance granting to the water company the right and privilege for the term of twenty-five years of supplying the city with water, for which the city agreed to pay an annual rental for each hydrant, the Supreme Court of Texas held to be the grant of an exclusive privilege to the water company for the period named. The decision seems to have been rested largely upon the use of the words 'privilege and supplying,'—words which are not found in the contract in this case. Without expressing an opinion upon the point involved in that case, we are content to say that an ordinance granting a right to a water company, for twenty-five years to lay and maintain water pipes for the purpose of furnishing the inhabitants of a city with water, does not, in our opinion, create a monopoly or prevent the granting of a similar franchise to another company. Particularly is this so when taken in connection with a further stipulation that the city shall not erect water works of its own. This provision is not devoid of an implication that it was intended to exclude only competition from itself, and not from other parties whom it might choose to invest with a similar franchise."

We think the Court of Civil Appeals has properly disposed of all the matters complained of by plaintiff in error, and finding no error in the judgment of that court, it is ordered affirmed.

J. B. DIBRELL,
Associate Justice.

Endorsed: No. 2286. Ennis Water Works vs. City of Ennis. Opinion. Judgments affirmed. Filed in the Supreme Court of Texas the 13th of March, 1912. F. T. Connerly, Clerk. Mr. Justice Dibrell.

107 *Judgment.*

March 13th, 1912.

No. 2286.

ENNIS WATER WORKS
vs.
CITY OF ENNIS.

From Ellis Co., 5th District.

Opinion Delivered by Associate Justice Dibrell.

This cause came on to be heard on writ of error to the Court of Civil Appeals for the Fifth Supreme Judicial District, and the original transcript in said cause being before the Court as well as the transcript showing the proceedings had in said Court of Civil Appeals, and these having been duly considered, because it is the opinion of this Court that there was no error in the Judgment of the Court of Civil Appeals and District Court, it is therefore considered, adjudged and ordered that said Judgments be affirmed: That the plaintiff in error, Ennis Water Works and its sureties, A. M. Morrison, B. Baldridge and F. Freeman, pay all costs in this behalf expended in this Court and in the Court of Civil Appeals, and this decision be certified to the District Court for observance.

Motion for Rehearing.

Filed March 26th, 1912.

In the Supreme Court of Texas.

ENNIS WATER WORKS, Plaintiff in Error,
vs.
CITY OF ENNIS, Defendant in Error.

108 Motion for Rehearing.

Now comes Ennis Water Works, Plaintiff in Error, by its Attorney, and moves the Court for a re-hearing in this cause for the following reasons to-wit:

(I.)

This Court has erred in refusing to sustain the First Assignment of Error, and in holding that the franchise grant herein in question is exclusive, and therefore obnoxious to the provisions of the Constitution of this State against Monopolies, and in refusing to hold that such franchise ordinance and the agreement thereunder constitute a valid contract between the City of Ennis and A. M. Morrison and

his assigns, and that the ordinances of the City of Ennis of April 22d, 1909 and March 15, 1910, attempting to invalidate, or to procure the invalidation of, said franchise ordinance are laws impairing, or attempting to impair, the obligations of a contract and are violative of Article 1, Section 10 of the Constitution of the United States.

(II.)

This Court has erred in ignoring and in refusing to sustain the Second Assignment of error by which it has in effect held, and it errs in so holding, that although the City of Ennis sought to repudiate its own ordinance, that when permitted to do so by the judgment of the trial Court, it had a right to the enforced use of the property of plaintiff in Error upon terms arbitrarily fixed by the trial court.

The judgment of the trial court awarding such enforced use of the property of plaintiff in error upon terms arbitrarily fixed by it was, we still insist, a taking of property without due process of law, and a denial to plaintiff in error of the equal protection of the law.

109 Rhodes S. Baker, Esq., and his firm of Spence, Knight, Baker and Harris, of Dallas, Dallas County, Texas, are Attorneys of Record for the Defendant in Error, the City of Ennis.

Since we think a Writ of Error lies in this case to the Supreme Court of the United States we respectfully ask, in case this Motion is overruled that the mandate of this Court be suspended for a reasonable time, to be not less than thirty days, to permit a proper application for such writ of error to be made.

G. C. GROCE,
Attorney for Plaintiff in Error.

Endorsed: Mo. No. 2703. Ennis Water Works, Plaintiff in Error vs. City of Ennis, Defendant in Error. Motion for Rehearing. Filed in Supreme Court March 26, 1912. F. T. Connerly, Clerk. By. J. S. Myrick, Deputy. Precept & Cert. Copy issued March 28, 1912. Submitted April 10, 1912. Overruled. 5-22-1912.

Precept.

Issued March 28, 1912.

The State of Texas to the Sheriff of Dallas County, Greeting:

You are hereby commanded, that you serve upon Rhodes S. Baker, Spence, Knight, Baker & Harris, Attorneys of record for City of Ennis, in the case of Ennis Water Works, Plaintiff in Error vs. City of Ennis, Defendant in Error, the accompanying certified copy of motion for rehearing, made by G. C. Groce, Attorney of record for Ennis Water Works, in said cause, now on file in this office.

110 Herein fail not, but of this writ make due return, under the penalty prescribed by law, with your indorsement thereon, showing how you have executed the same.

Witness, the Hon. T. J. Brown, Chief Justice of our said Supreme Court, with the Seal thereof annexed, at Austin, this the 28th day of March, 1912.

[L. S.] F. T. CONNERLY,
Clerk,
By J. S. MYRICK,
Deputy.

Endorsed: Supreme Court, Austin. Ennis Water Works vs. City of Ennis. Precept. Issued March 28th, 1912. F. T. Connerly, Clerk. By J. S. Myrick, Deputy. Sheriff's Return. Came to hand Mch. 29, 1912, Executed Mch. 30, 1912, by delivering to the within named Rhodes S. Baker, Atty. for Deft., in person, the accompanying certified copy of motion. B. F. Brandenburg, Sheriff Dallas County. By J. M. Williams, Deputy. Sheriff's Fees, $1.00. Received back April 1st, 1912.

111 *Order Overruling Motion for Rehearing.*

May 22nd, 1912.

Mo. No. 2703, No. 2286.

ENNIS WATER WORKS
vs.
CITY OF ENNIS.

From Ellis County, 5th District.

This day came on to be heard the motion of plaintiff in error Ennis Water Works for a rehearing, and the same having been duly considered, it is ordered that said motion be overruled: That the plaintiff in error, Ennis Water Works and its sureties, A. M. Morrison, B. Baldridge and F. Freeman, pay all costs incurred on this motion. The issuance of mandate is withheld thirty days from this date by order of Court.

112 *Petition for Writ of Error.*

Filed June 18th, 1912.

In the Supreme Court of Texas.

ENNIS WATER WORKS, Plaintiff in Error,
vs.
CITY OF ENNIS, Defendant in Error.

To any Justice of the Supreme Court of the United States or to the Chief Justice of the Supreme Court of Texas:

Your Petitioner, Ennis Water Works, a Corporation duly incorporated under the laws of the State of Texas, having its domicil

and principal place of business at Ennis, in Ellis County, Texas, Plaintiff in Error in the above styled cause, wherein the City of Ennis, a municipal corporation, duly incorporated under the laws of Texas, and located in said Ellis County, Texas, respectfully represents:

That on the 14th day of May, 1910, a judgment was rendered in the District Court of Ellis County, Texas, in a suit therein pending, wherein said City of Ennis was Plaintiff and your Petitioner was Defendant, of which cause said Court had jurisdiction, whereby rights, privileges and franchises claimed, enjoyed and exercised by your Petitioner, for many years before that date, as Assignee of one A. M. Morrison, under an ordinance of said City of Ennis of date the 19th day of March, 1900, granting to said A. M. Morrison, his heirs and assigns, for the term of thirty years from the adoption of said ordinance, "the right and privilege to supply said City of Ennis, and the inhabitants thereof, and other territory adjacent thereto, with water for domestic and other uses, and for preventing and extinguishing fires", with certain other rights, and under terms and conditions shown by said ordinance, and under a contract entered into under said ordiance, on to-wit, the 22nd day of March, 1900, between said City of Ennis and said A. M. Morrison, were found and adjudged, forfeited, cancelled, vacated, terminated, and held for naught,
113 and your Petitioner by further terms of such Judgment, was ousted from the enjoyment, use and exercise of such rights, privileges and franchises, and there were appropriate*d* orders, directions and provisions in said Judgment to make the same effective.

Pursuant to the provisions of the Civil Statutes of the State of Texas, said cause was duly appealed to the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas, which Court on to-wit the 25th day of March, 1911, affirmed the judgment of said District Court, and subsequently refused a rehearing, and afterwards a Writ of Error was duly prosecuted from said Court of Civil Appeals to the Supreme Court of the State of Texas, which Court on, to-wit the 13th day of March, 1912, affirmed the judgment of said Court of Civil Appeals, and afterwards, to-wit on the 22nd day of May, 1912, overruled and refused a rehearing in said cause, by which the judgment of said Supreme Court became final and said Court is the highest Court in Texas in which a decision in said action can be had.

The City of Ennis, Plaintiff in said suit, claimed therein that the ordinance, franchise grant, and contract above mentioned, conferred upon said Morrison, and his assigns, an exclusive right and privilege to supply the City of Ennis, and the inhabitants thereof, and of the territory adjacent thereto, with water for domestic and other uses, and for preventing and extinguishing fires, and that therefore such franchise grant, and the contract made in pursuance thereof, were obnoxious to the provisions of the Constitution of Texas against monopolies.

Said City of Ennis further based its claim that said franchise grant and the contract made thereunder, should be cancelled and annulled, and all rights claimed thereunder forfeited and held for naught, upon

two certain ordinances of said city enacted April 22", 1909, and March 15th, 1910, respectively, set up and pleaded by it.

By said ordinance of April 22", 1909, the City Council of the City of Ennis undertook to ordain, enact and declare that all
114 franchise rights claimed and exercised by said A. M. Morrison and your Petitioner, or either, under the aforesaid franchise ordinance and contract thereunder, were claimed and exercised illegally, and contrary to the Constitution and laws of Texas, and that such ordinance and contract were, and had always been, null and void, which nullity this ordinance undertook to accept for the City of Ennis, and to direct that such franchise rights be reclaimed by appropriate action in Courts of competent jurisdiction, to prevent the alleged unlawful use of the franchise thus repudiated, and sought to be forfeited and annulled.

By said ordinance of March 15", 1910, the City Council of the City of Ennis undertook to enact, in substance, the same matters and things enacted and attempted to be ordained by said ordinance of April 22", 1909, and further, to expressly repeal said Franchise Ordinance of March 19", 1900, and to cancel all contracts, agreements, franchises and privileges purporting to be based thereon.

There were also allegations of non user and misuser upon which forfeiture was also claimed, and said Ordinances of April 22", 1909 and March 15", 1910 purported to be based, in part, upon allegations of non-user and mis-user, but all such allegations were held insufficient by the trial Court and were not, to any extent, the basis of the Judgment rendered, and subsequently affirmed, as aforesaid.

Your Petitioner in said cause pleaded, and insisted that said franchise ordinance and the agreement made thereunder constituted a valid and binding contract between said City of Ennis and A. M. Morrison and his assigns, which said Morrison first, and then your Petitioner as his Assignee, had for many years, on their part, in good faith carried out and performed, in accordance with the true intent and meaning of such ordinance and contract, and that your Petitioner was entitled to the benefits of said contract according to its terms, and that said Ordinances of April 22", 1909, and
115 March 15th, 1910 were laws impairing or attempting to impair the obligation of a contract, in violation of the prohibitions of Article 1, Sec. 10 of the Constitution of the United States, and thus rights, privileges and immunities under the Constitution of the United States were set up and claimed in said action by your Petitioner, and the Judgments of each and all of said State Courts were against such rights, privileges and immunities so set up and claimed.

In holding that said franchise ordinance of March 19", 1900, and the agreement made thereunder, were violative of the provisions of the Constitution of Texas in respect to monopolies, and in forfeiting the rights claimed by your Petitioner, as assignee of said A. M. Morrison under such ordinance and agreement, and in refusing to hold that said ordinance and the agreem/nt made thereunder constituted a valid contract to the benefits of which your Petitioner was, and is, entitled, and in refusing to hold that said ordinances of April

22", 1909, and March 15", 1910, were laws impairing, or attempting to impair the obligations of a contract, said several State Courts, and particularly said Supreme Court of Texas, erred to the prejudice and injury of your Petitioner, as will be more fully shown by an assignment of errors herewith filed, as a part hereof, and deprived your Petitioner of rights protected by Article 1, Sec. 10 of the Constitution of the United States.

Your Petitioner therefore prays that a writ of Error from the Supreme Court of the United States may issue to the Supreme Court of the State of Texas, for the correction of the errors herein complained of, and that a duly authenticated transcript of the records, proceedings and papers herein may be sent to the Supreme Court of the United States.

ENNIS WATER WORKS,
By G. C. GROCE, *Its Attorney.*

116 The Writ of Error as prayed for in the foregoing Petition is hereby allowed, the Writ to operate as a supersedeas, and the bond for that purpose is fixed at One Thousand Dollars.

Witness my hand this the 18th day of June, 1912.

T. J. BROWN,
Chief Justice, Supreme Court of Texas.

Attest:
F. T. CONNERLY, [SEAL.]
Clerk, Supreme Court of Texas.

Endorsed: In the Supreme Court of Texas. Ennis Water Works, Plaintiff in Error vs. City of Ennis, Defendant in Error. Petition for Writ of Error from Supreme Court of the United States. Filed in the Supreme Court of Texas, June 18, 1912. F. T. Connerly, Clerk.

117 *Writ of Error Bond.*

Filed June 21st, 1912.

In Supreme Court of Texas.

ENNIS WATER WORKS, Plaintiff in Error,
vs.
CITY OF ENNIS, Defendant in Error.

Know All Men by These Presents: That we, Ennis Water Works, a corporation duly incorporated under the laws of Texas, as principal, and the other undersigned parties as sureties are held and firmly bound unto the City of Ennis, a Municipal Corporation of Ellis County, Texas, also duly incorporated under the laws of the State of Texas, in the sum of One Thousand Dollars to be paid to said obligee, its successors, representatives and assigns to the payment of which well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents:

Sealed with our seals and dated this the 20th day of June, 1912.

Whereas Ennis Water Works, the above named Plaintiff in Error, hath prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the Supreme Court of Texas, on to-wit: the 13th day of March, 1912, made final by the refusal of a rehearing on to-wit: the 22nd day of May, 1912:

Now, therefore, the condition of this obligation is such that if the above named Plaintiff in Error shall prosecute its said writ of Error to effect and answer all costs and damages that may be adjudged if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and effect.

118

[SEAL.] ENNIS WATER WORKS,
By A. M. MORRISON,
Its President.
A. M. MORRISON. [SEAL.]
F. FREEMAN. [SEAL.]

THE STATE OF TEXAS,
County of Ellis:

I, Lem Wray, Clerk of the District Court in and for Ellis County, do hereby certify that the sureties on the within Bond are in my opinion good and ample security for the amount therein specified, and that I would accept and approve same if presented to me.

Given under my hand and seal of office at Waxahachie, Texas, this 20th day of June, 1912.

[SEAL.] LEM WRAY,
Clerk District Court, Ellis County, Texas.
By —— ——, *Deputy.*

The above and foregoing bond is approved this the 21st day of June, 1912.

T. J. BROWN,
Chief Justice, Supreme Court of Texas.

Endorsed: In Supreme Court of Texas. Ennis Water Works, Plaintiff in Error, vs. City of Ennis, Defendant in Error. Writ of Error Bond. Filed in the Supreme Court of Texas, June 21, 1912. F. T. Connerly, Clerk.

119

In the Supreme Court of Texas.

ENNIS WATER WORKS, Plaintiff in Error,
vs.
CITY OF ENNIS, Defendant in Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of Texas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in said Supreme Court of Texas,

before you, or some of you, being the highest Court of law or equity of the said State in which a decision could be had, in said suit between Ennis Water Works, Plaintiff In Error, and the City of Ennis, Defendant In Error, wherein was drawn in question the validity of a certain franchise grant and ordinance of the City of Ennis, Ellis County, Texas, of date the 19th day of March, 1900, granting to A. M. Morrison, a citizen of said City of Ennis, his heirs and assigns, for a term of thirty years from the date of the adoption of such ordinance, the right and privilege to supply the City of Ennis, and the inhabitants thereof and of the territory adjacent thereto, with water for domestic and other uses, and for preventing and extinguishing fires, together with certain other rights, under terms and conditions more fully shown by said ordinance, and a contract entered into under said ordinance on, to-wit; the 22d day of March, 1900, between said City of Ennis and said A. M. Morrison, all rights under which ordinance and contract were claimed by said Ennis Water Works, a corporation duly incorporated, as assignee of said Morrison, and which ordinance and contract were claimed by said City, to be void as conferring exclusive rights, and therefore violative of the provisions of the Constitution of Texas against monopolies; and which said franchise grant and contract were claimed by said Ennis Water Works, Assignee of said A. M.
120 Morrison, to be valid, and a binding contract between it, as such Assignee, and the City of Ennis, the obligation of which contract it claimed was protected from impairment by the guaranties of the Constitution of the United States; and wherein certain ordinances of the City of Ennis seeking to avoid and hold for naught said franchise grant, and the contract made thereunder, were claimed by said Ennis Water Works to be laws impairing the obligations of the contract, and in which cause the decision was against the validity of said franchise grant and contract, and against the claim that the ordinances seeking to avoid the same were laws impairing the obligation of the contract, in violation of the guaranties of the Constitution of the United States, a manifest error hath happened, to the great damage of the Plaintiff in Error, Ennis Water Works, as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in said Supreme Court at Washington within thirty days from the date hereof; that the records and proceedings aforesaid being inspected the said Supreme Court may cause further to be done therein to correct that error what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward Douglass White, Chief Justice of

the Supreme Court of the United States, this the 21st day of June, in the year of our Lord, One Thousand, Nine Hundred and Twelve.

[The Seal of the U. S. District Court, Western Dist. Texas.]

D. H. HART,
Clerk of the District Court of the United States for the Western District of Texas.

Allowed as a supersedeas by

T. J. BROWN,
Chief Justice of the Supreme Court of Texas.

Filed in the Supreme Court of Texas, June 21st, 1912.
F. T. CONNERLY, *Clerk.*

120½ [Endorsed:] In The Supreme Court of Texas. Ennis Water Works, Plaintiff In Error, vs. City of Ennis, Defendant In Error. Writ of Error.

121 UNITED STATES OF AMERICA, *ss:*

To the City of Ennis, Greeting:

You are cited and admonished to be and appear at a Supreme Court of the United States at Washington within thirty days from the date hereof pursuant to a Writ of Error filed in the Clerk's Office of the Supreme Court of the State of Texas, wherein Ennis Water Works is Plaintiff in Error and you are Defendant in Error, to show cause, if any there be, why the judgment rendered against said Plaintiff in Error as in said Writ of Error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Thos. J. Brown, Chief Justice of the Supreme Court of Texas, this the 21st day of June, in the year of our Lord, One Thousand, Nine Hundred and Twelve.

T. J. BROWN,
Chief Justice of the Supreme Court of Texas.

[The Seal of the U. S. District Court, Western Dist., Texas.]

Attest:

D. H. HART,
Clerk, United States District Court, W. Dist. of Texas, at Austin.

[Seal Supreme Court of the State of Texas.]

Attest:

F. T. CONNERLY,
Clerk of the Supreme Court of Texas.

Service of the foregoing notice of writ of error is waived.

SPENCE, KNIGHT, BAKER & HARRIS,
Attorneys for City of Ennis, Defendant in Error.

121½ [Endorsed:] In The Supreme Court of Texas. Ennis Water Works, Plaintiff In Error, vs. City of Ennis, Defendant In Error. Original Citation In Error.

122 *Assignment of Errors.*

Filed June 21st, 1912.

In the Supreme Court of Texas.

ENNIS WATER WORKS, Plaintiff in Error,
vs.
CITY OF ENNIS, Defendant in Error.

Now comes Ennis Water Works, Plaintiff In Error in the above entitled cause, and avers and shows that in the record and proceedings in said cause the Honorable Supreme Court of Texas has erred to the grievous injury and wrong of the Plaintiff In Error herein, and to the prejudice, and against the rights of Plaintiff In Error, in the following particulars to-wit:

I.

Said Supreme Court erred in holding that the franchise grant and ordinance in issue in this cause, and the agreement made thereunder were violative of the provisions of the Constitution of Texas against Monopolies and in forfeiting the rights claimed by Plaintiff In Error thereunder and in refusing to hold that such franchise grant and ordinance and the agreement made thereunder, constituted, and constitute a valid contract between the City of Ennis and A. M. Morrison and his assigns, to the benefits of which Plaintiff In Error, as Assignee of said A. M. Morrison was, and is, entitled, and in refusing to hold that the ordinances of the City of Ennis of April 22", 1909, and March 15", 1910, attempting to invalidate, or to procure the invalidation of said franchise ordinance, and the agreement made thereunder, were, and are laws impairing, or attempting to impair, the obligations of a contract, and that the same are violative of Art. 1, Sec. 10 of the Constitution of the United States.

123 Wherefore for this and other manifest errors appearing in the record, Ennis Water works prays that the Judgment of said Supreme Court, and the Judgment of the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas, which was affirmed by the Judgment of said Supreme Court, and the Judgment of the District Court of Ellis County, Texas, which was affirmed by the Judgment of said Court of Civil Appeals, be all reversed, set aside and held for naught, and that Judgment be rendered for Plaintiff In

Error, Ennis Water Works granting its rights under the Constitution and laws of the Unites States.

G. C. GROCE,
Attorney for Ennis Water Works,
Plaintiff In Error.

Endorsed: In the Supreme Court of Texas. Ennis Water Works, Plaintiff In Error, vs. City of Ennis, Defendant In Error. Assignment of Errors. Filed in the Supreme Court of Texas, June 21st, 1912. F. T. Connerly, Clerk

124 CLERK'S OFFICE, SUPREME COURT OF TEXAS.

I, F. T. Connerly, Clerk of The Supreme Court of Texas, do hereby certify that the foregoing one hundred and twenty-three pages (except Pages 119, 120 and 121) contain a true and correct copy of the Transcript of the Record of all the proceedings had in the District Court of Ellis County, Texas; in the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas, at Dallas, and in The Supreme Court of Texas, as the same appear of record and on file in this office in Cause No. 2286, entitled, Ennis Water Works, Plaintiff in Error, vs. City of Ennis, Defendant in Error.

I further certify that the pages herein numbered 119 and 120, is the Original Writ of Error, of which a copy has been lodged, and is now on file in this Office, and that the page herein numbered 121, is the Original Citation in Error, a copy of which is now on file in this Office.

In testimony whereof, I have hereto signed my name, and affixed the seal of the Supreme Court of Texas, at the City of Austin, this the 2nd day of July, A. D. 1912.

[Seal Supreme Court of the State of Texas.]

F. T. CONNERLY,
Clerk of The Supreme Court of Texas.

Endorsed on cover: File No. 23,300. Texas Supreme Court. Term No. 305. Ennis Water Works, plaintiff in error, vs. City of Ennis. Filed July 17th, 1912. File No. 23,300.

SUBJECT INDEX

		Pages
1.	Statement of the case	1-9
2.	Franchise Ordinance in issue	2-7
3.	Specification of error	9-10
4	The Franchise Ordinance in issue; properly construed, grants no exclusive rights and creates no monopoly	10-11
5.	Charter authority of the City of Ennis in respect to water supply	11
6.	The Franchise grant in issue is reasonable in its terms	12
7.	The Franchise grant in issue should, if practicable, be given a construction which will uphold it, rather than one which would render it illegal	12
8.	Under well settled rules of construction the franchise grant herein in issue should not be held exclusive	13-14
9.	The City of Ennis had authority to make the contract herein in issue with reference to its own lakes	14
10.	The Court in determning whether there is a contract, and whether it is being impaired, contrary to the guaranties of the Federal Constitution, acts independently of the State Courts	20-21
11.	The Ordinance of the City of Ennis undertaking to annul and repeal the franchise ordinance in issue are laws impairing the obligations of a contract	21

AUTHORITIES CITED.

	Pages
Altgelt vs. City of San Antonio, 81 Tex. 436	24
Atlantic City Water Co. vs. Consumers Water Co., 44 N. J. Eq. 427	12
Bartholomew vs. City of Austin, 29 C. C. A. 568	13-37
Caldwell vs. May's Landing Water Power Co., 44 N. J. Eq. 245	12
City of Austin vs. Nalle, 85 Tex. 520	24-25
C. B. & Q. Ry. Co. vs. Nebraska, 170 U. S. 57	21
City of Brenham vs. Brenham Water Co., 67 Tex. 542	23
City of Vicksburg vs. Vicksburg Water Co., 202 U. S. 553	14
City of Walla Walla vs. Walla Walla Water Co., 172 U. S. 1	13-30-32
Constitution of Tex., Art. I, Sections 23 and 26	5
Cunningham vs. Cleveland, 39 C. C. A. 211	12-14-40
Davis & F. Mfg. Co. vs. Los Angeles, 189 U. S. 207	21
Edwards County vs. Jennings, 89 Tex. 621	24-25
Grand Trunk Ry. Co. vs. South Bend, 227 U. S. 544	20
Hamilton Gas, Light & Coke Co. vs. Hamilton, 146 U. S. 258	14
Hartford Fire Ins. Co. vs. City of Houston, 102 Tex. 317	24-26
Helena Water Works Co. vs. City of Helena, 195 U. S. 583	12-14
Hurley Water Co. vs. Vaughn, 91 N. W. 971	12
Ill. Tr. and Savings Bank vs. Arkansas City, 22 C. C. A. 171	12
In Re Brooklyn, 143 N. Y. 596	14
Joplin vs. Light Co., 119 U. S. 184	12-14
Little Falls E. & W. Co. vs. Little Falls, 102 Fed. 663	12-14
Long Island Water Supply Co. vs. Brooklyn, 166 U. S. 685	14
Mahon vs. City of Columbus, 58 Miss. 310	14-16
Mayor et al. vs. Houston St. Ry. Co., 83 Tex. 548	14-26
Mercantile Trust Co. vs. Columbus, 203 U. S. 311	21
Morgan Bros. vs. M. K. & T. Ry. Co. of Tex., 110 S. W. 985	12
Northern Pacific Ry. Co. vs. Minnesota, 208 U. S. 590	21
Oconto Water Co. vs. Oconto, 105 Wis. 76	12
Revised Statutes of Texas, 1895, Art. 418; 1911, Art. 865	11
State vs. G. H. & S. A. Ry. Co., 100 Tex. 153	12
Stearns vs. Minnesota, 179 U. S. 223	21
Stein vs. Bienville Water Supply Co., 141 U. S. 67	14
St. Paul Gaslight Co. vs. St. Paul, 181 U. S. 142	21
Syracuse Water Co. vs. City of Syracuse, 116 N. W. 167	14
Tex. Central R. R. Co. vs. Marrs, 100 Tex. 530	12
Valpariso vs. Gardner, 49 Am. R. 416	12
Waco Water & Light Co. vs. City of Waco, 27 S. W. 675	12
Water, Light & Gas Co. vs. Hutchinson, 207 U. S. 385	14-34

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1913.

No. 305

ENNIS WATER WORKS, PLAINTIFF IN ERROR

vs.

CITY OF ENNIS, DEFENDANT IN ERROR

IN ERROR TO THE SUPREME COURT OF TEXAS

BRIEF FOR PLAINTIFF IN ERROR

The sole question presented in this case is the validity of a water franchise granted by the City of Ennis, a municipality of more than five thousand inhabitants, incorporated under the general municipal charter laws of the State of Texas, (Rec. 1:23) to one A. M. Morrison, his heirs and assigns, and claimed by appellant, a corporation organized under the laws of Texas, as assignee of said Morrisson, or, possibly more technically speaking, the question is the validity of certain ordinances of the City of Ennis attempting to repeal and annual said water franchise grant.

On March 19, 1900, the City of Ennis, Texas, having, under its charter, authority "to provide, or cause to be provided, the city with water," and to establish public reservoirs within the City, or beyond its limits, for the extinguishment of fires, and the convenience of its inhabitants, (Revised Statutes of Texas of 1895, R. S. Art. 418; R. S. '11, Art. 865) and then the owner of two lakes of impounded water, and some water main from which through a distribution plant owned by A. M. Morrision, one of its citizens, it, its inhabitants and industries, were being supplied with water, (Rec. 24) by its council, enacted an ordinance, as follows:

"BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF ENNIS, TEXAS, THAT:

Sec. 1. The said City of Ennis does hereby give and grant unto A. M. Morrison, a citizen of the City of Ennis, Texas, his heirs and assigns, for the term of thirty years from the date of the adoption of this ordinance the right and privilege to supply the City of Ennis and the inhabitants thereof (and of the territory adjacent thereto) with water for domestic and other uses and for preventing and extinguishing fires. (Rec. 3.)

Sec. 2. The said A. M. Morrison, his heirs or assigns is hereby authorized and empowered to establish, construct, maintain and operate a system of waterworks in or adjacent to the City of Ennis, to receive, take and store, conduct and distribute water through said city and adjacent territory; to construct and extend mains and pipes through all the streets, alleys, public grounds and all places under the control of said City of Ennis, and we hereby ratify and approve

the location of all machinery, mains and pipes now laid or in use; to erect and maintain all engines, machinery and all other appliances necessary for the proper conduct of said waterworks and for supplying said city and the inhabitants thereof and of adjacent territory with water for domestic, manufacturing, extinguishing fires and other purposes. (Rec. 3.)

Sec. 3. Said A. M. Morrison shall have the right and is hereby granted the privilege to take up all pavements and sidewalks, streets, alleys, lanes or public groves or places and make such excavations therein, as may be necessary to lay, repair and maintain pipes below the surface of the ground for conveying and distributing water as aforesaid: provided, however, that said Morrison shall within a reasonable time, replace, repair all such pavements and sidewalks and other property, making them in as good condition as they were before or as nearly so as practicable. (Rec. 3.)

Sec. 4. The City of Ennis hereby contracts with the said A. M. Morrison, his heirs and assigns to rent and does rent of him thirty-five (35) double-nozzle fire hydrants, as the same are now located for extinguishing fires at a rental of Twelve Hundred Dollars ($1200.00) per annum, payable monthly in advance; and the City Council for the purpose of providing for the payment of all such hydrant rental shall levy, collect and appropriate annually a sufficient sum of money to cover the amount to become due under this contract. (Rec. 3-4.)

Sec. 5. At any time the City Council shall direct, said A. M. Morrison, his heirs or assigns, shall make extensions to

the mains, provided that the amount of such extensions shall not exceed two thousand (2000) feet per annum, unless said Morrison, his heirs or assigns, shall consent thereto; and provided further that a double-nozzle and steamer connection fire hydrants shall be located on every 100 feet of such extensions, for which hydrants the City of Ennis contracts and agrees with said Morrison his heirs and assigns to pay him a rental of Forty Dollars ($40.00) each per annum payable in the manner, at the time and by the means provided in the preceeding section. (Rec. 4.)

Sec. 6. The said Water Works system shall be maintained in good and efficient working order during the term of this contract, and a pressure shall always be maintained in the mains equal to the pressure which results from eighty feet (80) of water in the standpipe, unless prevented by unavoidable causes; and it is further agreed that the pumping capacity shall be increased from time to time to meet the growth and demand of the City of Ennis. (Rec. 4.)

Sec. 7. The City of Ennis grants to said A. M. Morrison, his heirs or assigns the right and privilege to take all the water that may be required for the purposes above enumerated from the reservoirs or lakes situated as follows:

(1) The reservoir known as the "Old Lake" situated North West of the City of Ennis, Texas, being a part of the I. D. Sheppard Survey, and adjoining a certain 73 3-10 acre tract of land owned by the H. & T. R. R. C. Co.

(2) The reservoir known as the "New Lake" also situated North West of the City of Ennis, and being on the same tract of land contracted for the City of Ennis from Mark Latimer on the 17th day of January, 1895, to which reference is here made for a fuller description.

Together with the right of way through all the grounds adjacent to said lakes and owned by the city, subject to the contracts heretofore entered into by and between the City of Ennis and the Houston and Texas Central Railroad Company, with reference to the use of water by the said Railway Company, out of said lakes. The further privilege is granted to the said Morrison, his heirs and assigns to enter in and upon said tracts of lands upon which said reservoirs are situated and to erect thereon machinery and improvements necessary for the conduct of said water business. (Rec. 4.)

Sec. 8. The City of Ennis in consideration of the sum of Fifty Dollars ($50.00) per month, payable to it on the first day of each month in advance hereby lets and leases to the said A. M. Morrison his heirs and assigns, during the term of this contract about 8000 feet of 8-inch water main belonging to the said City of Ennis and laid by it from the pumping station at said New Lake to a junction with his mains near the stand-pipe. (Rec. 4-5.)

Sec. 9. The said A. M. Morrison shall furnish water to the citizens of Ennis at a rate not to exceed the average of water rates of cities in Texas of population approximately the size of Ennis. (Rec. 5.)

Sec. 10. The City of Ennis reserves to itself the right to acquire by purchase and become the sole owner of said waterworks system at the expiration of five years, or in periods of five years thereafter upon giving twelve months' notice of such intention and upon paying therefor to the owners thereof the value of said property at the time of said purchase. Franchise having been given without consideration

not to be valued in this appraisement. And such value shall be ascertained by appraisement each party to select a disinterested and competent person for that purpose; and if the said appraisers fail to agree they shall select an umpire to act with them, which said umpire shall pass upon the points of disagreement between the two said appraisers. (Rec. 5.)

Sec. 11. Any person or persons who shall willfully or maliciously injure or destroy any portion of the works, fixtures, or other property belonging or appertaining to said works or constituting a part thereof, or shall wrongfully interfere with or open any hydrant or waste any water therefrom or shall take any public or private hydrant, faucet or fixture without the consent of the owner of said waterworks, or shall in any way pollute the water supply shall be deemed guilty of a misdeameanor and upon conviction thereof shall be punished by a fine of not less than one dollar nor more than one hundred dollars and costs of prosecution. (Rec. 5.)

Sec. 12. The said A. M. Morrison shall commence the extension of said Water Works system within four months from the adoption of said ordinance and shall complete the same to the extent of at least two thousand feet within six months thereafter. (Rec. 5.)

Sec. 13. This ordinance shall be a contract by and between the City of Ennis, Texas, and the said A. M. Morrison, his heirs ,successors and assigns, and shall be binding upon both parties hereto, provided the said A. M. Morrison shall file with the City Secretary his acceptance of the same in writing within ten days after the adoption hereof. The Mayor and City Secretary are hereby authorized and directed to sign and acknowledge such paper or papers as may be necessary to bear out any and all parts hereof. (Rec. 5.)

Sec 14. All ordinances or parts of ordinances heretofore passed by the City Council of the City of Ennis, Texas, that are in conflict with or opposition to this ordinance or any part thereof, are hereby repealed." (Rec. 5.)

At the time of the enactment of this ordinance, said A. M. Morrison was the owner of a water distribution plant in the City of Ennis, through which the city, its inhabitants, and industries were then being supplied with water from the City's lakes (Rec. 24) on terms not shown by the Record, and on March 22, 1900, said Morrison, in writing, filed with the City Secretary, his acceptance of the terms and conditions of this ordinance, and he and the Mayor and City Secretary of said City, entered into a written contract in the terms of aid ordinance, and under such contract, he, and the plaintiff in error herein, as his assignee, furnished water to the City of Ennis, and its inhabitants up to, and after the institution of this suit.

On April 22, 1909, the City Council of the City of Ennis, undertook and assumed to enact an ordinance of that date by which, in substance, it recited that the ordinance of March 19, 1900, and the contract made thereunder, were, and always had been void, and undertook to declare the nullity of such franchise ordinance and the contract made thereunder, and to direct that the franchise rights granted thereby be reclaimed, and ordered, such suits or other proceedings as might be necessary to that end. (Rec. 10.)

On May 19th, 1909, (Rec. 1) this suit was instituted in the District Court of Ellis County, Texas, to forfeit all rights claimed by Plaintiff In Error, as assignee of said Morrison, under said franchise ordinance, and the contract made thereunder. (Rec. 1-13.)

Pending the suit, the City Council of the City of Ennis, on March 15, 1910, assumed and attempted to pass another ordinance (Rec. 11) declaring the nullity of said franchise ordinance, and repudiating the same, and by amendment, both of said repudiating ordinances were set out, and it was claimed that said franchise ordinance and the contract made thereunder, granted exclusive rights, created a monopoly, and were violative of Art. 1, Sec. 26 of the Constitution of the State of Texas, declaring that "Perpetuities and monopolies are contrary to the genius of free government and shall never be allowed," and also of Art. I, Sec. 3, of said Constitution forbidding any grant of exclusive privileges, except in consideration of public services.

Other grounds for forfeiture were alleged, but they are unimportant here as the judgments of the several State Courts were based on findings of fact, substantially as above set out, and holdings as matter of law, that the franchise ordinance was obnoxious to the above objections for unconstitutionality.

In the State Courts, trial and Appellate, among other defenses, it was contended on behalf of Defendant in Error, by exceptions, plea, and proper assignments of Error, that the franchise ordinance in issue, was enacted in the proper exercise of municipal power, by the City of Ennis, and that it, and the contract entered into under it, constituted a valid and binding contract between the City of Ennis and said Morrison, and between said City and Plaintiff in Error, as assignee of said Morrison, and that the subsequent ordinances of April 22, 1909, and March 15th, 1910, attempting to annul and repudiate said franchise ordinance, and the contract made thereunder, were laws impairing or attempting to impair, the obli-

gations of a contract, and were violative of the provision of Sec. 10, Art. I of the Constitution of the United States, prohibiting any State from passing any law impairing the obligation of contracts. (Rec. 14, 18, 58, 50-51.)

A trial in the State Trial Court resulted in a judgment of forfeiture, which on appeal was affirmed by the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas, and on Writ of Error to the Supreme Court of Texas, was affirmed by that Court, the Chief Justice of which afterward granted a Writ of Error to this Court. (Rec. 28-30; 46, 66, 68-76.)

All these matters appear from the Record, without controversy:

Plaintiff's Petition Rec. 1-7; Defendant's answer, 14-18; Findings of Trial Court, Rec. 23-27; Judgment of Trial Court Rec. 27-30; Opinion of Court of Civil Appeals Rec. 37-46; Application to Supreme Court for Writ of Error Rec. 48-51, and especially P. 50 last paragraph; Opinion of State Supreme Court, Rec. 53-65; Proceedings on Writ of Error form State Court, Rec. 65-76.

The case is presented here upon a single specification of error, which is:

Said (State) Supreme Court erred in holding that the franchise grant and ordinance in issue in this cause, and the agreement made thereunder were violative of the provisions of the Constitution of Texas against Monopolies and in forfeiting the rights claimed by Plaintiff in Error thereunder and in refusing to hold that such franchise grant and ordi-

nance and the agreement made thereunder, constituted, and constitute a valid contact between the City of Ennis and A. M. Morrison and his assigns, to the benefits of which Plaintiff in Error, as Assignee of said A. M. Morrison was, and is, entitled, and in refusing to hold that the ordinances of the City of Ennis of April 22nd, 1909, and March 15th, 1910, attempting to invalidate, or to procure the invalidation of said franchise ordinance, and the agreement made thereunder, were, and are laws impairing, or attempting to impair the obligations of a contract, and that the same are violative of Art. 1, Sec. 10 of the Constitution of the United States. (Rec. 75.)

ARGUMENT.

THE FRANCHISE, ORDINANCE HEREIN INVOLVED, AND THE CONTRACT OF MARCH 22th, 1900, MADE PURSUANT TO IT, CONSTITUTE, A VALID AND BINDING CONTRACT BETWEEN THE CITY OF ENNIS AND A. M. MORRISON, AND HIS ASSIGNS BY WHICH THE CITY, THE OWNER OF A SOURCE OF WATER SUPPLY, PROCURED THE DISTRIBUTION OF WATER FROM SUCH SOURCE OF SUPPLY FOR THE BENEFIT OF ITSELF AND ITS INHABITANTS, BY MEANS OF A WATER DISTRIBUTION PLANT OWNED BY ONE OF ITS CITIZENS, AND IN CONNECTION WITH WHICH THE CITY ACQUIRED OTHER VALUABLE RIGHTS. THIS ORDINANCE AND THE CONTRACT UNDER IT, CONFERRED ON MORRISON AND HIS ASSIGNS, NO EXCLUSIVE RIGHTS, BUT ONLY THE RGHT AND

PRIVILEGE TO TAKE ALL THE WATER CONTEMPLATED TO BE FURNISHED UNDER IT FROM THE CITY'S LAKES SUBJECT TO CONTRACTS BEFORE THAT TIME ENERED INO BETWEEN THE CITY AND A RAILWAY COMPANY WITH REFERENCE TO THE USE OF WATER BY SAID RAILWAY COMPANY OUT OF SAID LAKES, AND THE RIGHT TO ERECT MACHINERY AND IMPROVEMENTS ON THE CITY'S LAND NECESSARY TO THE CONDUCT OF THE CONTEMPLATED WATER BUSINESS. SAID ORDINANCE AND CONTRACT DID NOT CREATE A MONOPOLY AND THE SUBSEQUENT ORDINANCES OF APRIL 22th, 1909, AND MARCH 15th, 1910, UNDERTAKING TO REPEAL AND ANNUL SAID FRANCHISE ORDINANCE AND TO REPUDIATE THE CONTRACT MADE THEREUNDER, WERE AND ARE, LAWS IMPAIRING, OR ATTEMPTING TO IMPAIR, THE OBLIGATIONS OF A CONTRACT.

The City of Ennis, under its charter had authority "to provide, or cause to be provided, the city with water, to * * * establish * * * reservoirs * * * within the city or beyond its limits, for the extinguishment of fires, and the convenience of the inhabitants." Revised Statutes of Texas of 1895, Art. 418, Art. 865, Code 1911.

This grant of power is broad and comprehensive, and is unrestrained, unless by the constitutional prohibition against monopolies and perpetuities, and possibly the power of the Courts to declare municipal ordinances void for unreasonableness. Aside from the constitutional objection there is noth-

ing to show that the franchise ordinance was unreasonable. On the contrary we submit that it was, and is, entirely reasonable.

Waco Water & Light Co. vs. City of Waco, 27 S. W., 675.
Valparaiso vs. Gardner, 49 Am. R., 416.
Ill. Tr. and Savings Bank vs. Arkansas City (76 Fed. 271) 22 C. C. A., 171.
Oconto Water Co. vs. Oconto (80 N. W. 1113) 105 Wis., 76.
Hurley Water Co. vs. Vaughn, 91 N. W., 971.
Little Falls E. & W. Co. vs. Little Falls, 102 Fed., 663.
Cunningham vs. Cleveland, (39 C. C. A., 211) 98 Fed., 657.

When an ordinance, or contract is subject to two constructions one of which would render it unconstitutional and void and the other not, such construction should be given it as will make it accord with the constitution. It is not to be presumed that the parties intend to violate the constitution, or to do a vain thing. Every implication is in favor of the validity of a Legislative Act. Courts may resort to implication to sustain a Statute, but not to destroy it.

Helena Water Works Co. vs. City of Helena, 25 Sup. R., 40; 195 U. S., 383.
Joplin vs. Light Co., (24 Sup. R., 43) 191 U. S., 184.
Atlantic Water Co. vs. Consumers Water Co., 44 N. J., Eq., 427-437.
Caldwell vs. May's Landing Water Power Co. 44 N. J. Eq. 245-249.
State vs. G. H. & S. A. Ry Co., 100 Tex., 153.
Tex. Central R. R. Co. vs. Marrs, 100 Texas, 530.
Morgan Bros. vs. M. K. & T. Ry Co. of Tex., 110 S. W., 985.

The case of Atlantic City Water Co. vs. Consumers Water Co., above cited, strongly illustrates the principle of construction here contended for. This was a contest between two water companies in which one claimed as against the other an exclusive right, under certain acts of the New Jersey Legislature, to supply Atlantic City with water. In a previous case it had been held, without noticing a constitutional provision prohibiting any grant or exclusive privileges or franchises, that the complaining company, under the legislative acts in question, had the exclusive privilege claimed by it, but in the case cited, the court says that the previous holding, beyond all question, was without the constitutional provision against exclusive franchise being before the mind of the Court, and as the acts under which the exclusive privilege was claimed did not in terms confer exclusive rights, and to hold that they did confer such rights would render them unconstitutional, that construction should be adopted which would render these acts valid, for it must not be presumed that the legislature intended to violate the constitution, and therefore, instead of holding the legislative acts unconstitutional, the court held against the claim of exclusive right. This rule of construction is recognized, and acted on, in the Texas cases cited.

It is a further well settled rule of construction that grants of franchises by municipalities are to be strictly construed in favor of the public and such grants are not to be held exclusive unless clearly so.

City of Walla Walla vs. Walla Walla Water Co., (19 Sup. R., 77) 172 U. S., I.

Bartholomew vs. City of Austin, (85 Fed., 359) 29 C. C. A., 568.

Cunningham vs. City of Cleveland, (98 Fed., 657) 39 C. C. A., 211.
Long Island Water Supply Co. vs. City of Brooklyn, (17 Sup. R., 718) 166 U. S., 685.
Mayor et al vs. Houston Street Ry. Co., 83 Tex., 548-553.
Water, Light & Gas Co. vs. Hutchinson, (28 Sup. R., 135) 207 U. S., 385.
Little Falls E. & W. Co. vs. Little Falls, 102 Fed., 663.
In Re Brooklyn, (38 N. E. 983) 143 N. Y., 596.
Syracuse Water Co. vs. City of Syracuse, (22 N. E., 381) 116 N. Y., 167.
Stein vs. Bienville Water Supply Co., 141 U. S., 67-80, 81.
Hamilton Gas, Light and Coke Co. vs. City of Hamilton, 146 U. S. 258.
City of Vicksburg vs. Vicksburg Water Co., (26 Sup. R., 660) 202 U. S., 553.
Helena Water Works Co. vs. City of Helena, (25 Sup. R., 40) 195 U. S., 383.
Joplin vs. Light Co., (24 Sup. R., 43) 191 U. S., 184.

If under Constitutions like that of Texas a municipality may not grant an exclusive public service franchise, generally, it may, for valuable considerations, grant to one of its citizens owning a water distribution plant, the right and privilege, for a reasonable time, of supplying it, its inhabitants, and others, with water, from a source of supply owned by itself, and which it is otherwise not in condition to use, or distribute.

Mahon vs. City of Columbus, 58 Miss., 310.
Stein vs. Bienville Water Supply Co., 141 U. S., 67.
Walla Walla vs. Walla Walla Water Co., 172 U. S., 1.
Vicksburg vs. Vicksburg Water Co., 202 U. S., 453.

In Mahon vs. City of Columbus, above cited, the city was authorized by its charter "to provide the City with water for the use of the fire department, or of the citizens, by water

works within or beyond the boundaries thereof." The city erected water works that seem to have been used principally for furnishing water for the fire department, but to a limited extent to private citizens. The city authorities leased the water works to Mahon for a term of fifteen years, the lessee to keep the works in good working order, keep the reservoir supplied with water and furnish water for extinguishment of fires. Mahon was to receive his compensation solely from private persons to whom he might supply water, provided that in so doing he did not reduce the water in the reservoir below a specified limit. Mahon grossly failed to carry out his part of the contract, and the city authorities filed a bill in Chancery for rescission.

For the City it was contended that the city authorities had no right to delegate to Mahon the control of the City's water works so that they or their successors could not resume control whenever they saw fit. That the contract leasing to Mahon "the sole and exclusive privilege" of using water works for fifteen years was *ultra vires* and void. It was claimed that the city authorities "could not for fifteen years, or fifteen minutes, delegate their control to Mahon, or convey away their right to resume control whenever they might deem it necessary. (Page 319 of Report.)

These contentions were each and all denied by the Court, which held in substance that while a contract by city authorities might not cede away their right of control over public property for a long period of time, and expressly stipulate that neither they, nor the Courts could put an end to the lease even though the lessee should fail to perform the public duties assumed by him, there being no such erpress stipulation the

courts would have jurisdiction to cancel the lease for gross incompetence and failure of duty on the part of the lessee, and relief was granted on that ground. (Pages 326-327 of Report.)

The Court says:

> "It is insisted by counsel for the city that the contract was invalid in its inception, because of a failure to stipulate that it should be revocable at the pleasure of the city authorities; the argument being that it was incompetent for the latter to abdicate, for themselves and their successors in office, that control over the waterworks which was vested in them for the public good. We are not disposed to adopt this view. The mayor and aldermen were by the city charter authorized 'to provide the city with water for the use of the fire department or of the citizens, by waterworks within or beyond the boundaries thereof.' The authority being general, and there being no specification as to the manner of operating the works after their erection, we see no reason why it might not be as well done by contract as by hiring employees or electing a manager; and while it would have been the part of wisdom to have stipulated for a removal of the contractor for cause by the city government, we cannot say that the absence of such a provision rendered the contract null. In such cases, however, there must reside somewhere a power on behalf of the corporation, which is a constituent portion of the State, to put an end to a contract wholly unfulfilled by the contractor, under circumstances which render such failure eminently dangerous to the safety, the health and the continued existence of the city. A construction that would deny the power of interference to the courts would render the contract void as being in excess of authority on the part of the city officials."

The intent of the parties to the franchise ordinance and contract herein in issue is to be determined by their surroundings, the language of the ordinance and contract as a whole,

and the purposes sought to be accomplished, all to be considered in connection with the presumption that the parties intended to do a legal, and not an unlawful thing; to make a binding contract between themselves, and not to violate any constitutional provision.

The City of Ennis under statutory power had acquired two lakes of impounded water and some water main, but owned no distribution plant. One of its citizens owned a distribution plant by means of which the City, its inhabitatnts and industries were then being supplied with water from the city's lakes, on terms not disclosed by the record. (Rec. 24). There is nothing in the record to indicate that when the ordinance in question was passed there existed in or about Ennis any other available source of water supply than these lakes, and why may not this Court take notice of the difficulties of such Texas cities as Ennis in obtaining for themselves and their citizens adequate water supply, as did the Court in Illinois Trust & Savings Bank vs. Arkansas City, 22 C. C. A., 182, in respect to Kansas cities of like size?

The first section of the franchise ordinance is:

> "Sec. 1. The said City of Ennis does hereby give and grant unto A. M. Morrison, a citizen of the City of Ennis, Texas, his heirs and assigns, for the term of thirty years from the date of the adoption of this ordinance the right and privilege to supply the City of Ennis and the inhabitants thereof (and of the territory adjacent thereto) with water for domestic and other uses and for preventing and extinguishing fires." (Rec. 3.)

Upon the words granting "the right and privilege to supply the city of Ennis and the inhabitants thereof * * * with water for domestic and other purposes," etc., the Judgments

of the State Courts are based. The State Supreme Court holds that these words, as used, necessarily import exclusiveness. (Rec. 63 top.) In reaching this conclusion, we think the learned Judge rendering the opinion was not only at variance with the overwhelming weight of authority, as we will hereafter undertake to show, but he ignored the circumstances of the parties, other material provisions of the very ordinance in question, and well settled rules of construction.

Note the words in parenthesis in the first section of the franchise ordinance ("and of the territory adjacent thereto.") Why were these words used? They must be given some meaning if possible. Note, too, that Section 7 of the Ordinance grants to Morrison and his assigns "the right and privilege to take all the water that may be required for the purposes above enumerated" from the City's lakes, as the City and its inhabitants were then being supplied. This section grants to Morrison and his assigns the further privilege of entering upon the City's lands upon which the lakes were situated, and of erecting thereon machinery and improvements "necessary for the conduct of said water business." (Rec. 4.) By Sec. 8 the water main of the City connecting one of its lakes with the distribution system is leased to the grantee for the full term of the grant at $50.00 per month. (Rec. 4-5) and by Sec. 11 it is made a misdemeanor "in any way to polute the water supply." (Rec. 5.)

The City of Ennis could grant no extra territorial rights, except in respect to its own property, neither could it proceed against any one as for a misdemeanor for poluting a water supply beyond its borders. In direct connection with the grant to take all the water to be furnished under it from the city's

lakes, the right is further given to erect on the city's lands improvements necessary to the conduct of *said* water business. What water business was here contemplated, and in the same connection the franchise grantee leases the City's water main connecting one of the these lakes with his distribution plant for the full term of the grant at $600.00 per annum for the thirty years. Why was this done unless it was contemplated that the whole transaction had reference to these lakes, and did not contemplate any other source of water supply?

Taking into consideration all these special provisions and giving weight to each, in connection with the fact that the city, its inhabitants and industries were then being supplied with water from the City's lakes through Morrison's distribution plant, how can the conclusion be reasonably escaped, that the City and Morrison were contracting, and intending to contract, with reference to the source of water supply owned by the one and the distribution plant owned by the other? We think it can not be successfully denied that the ordinance and contract, all of their provisions being considered in connection with surrounding circumstances, are susceptible of that construction and if so, then the Courts, under well settled rules, should accept such construction, rather than by imputing strained meaning to just a few words; raise the specter of monopoly in order to strike it down "with mailed hands" (Rec. 61) and make what the parties evidently thought an innocent and proper contract illegal, as violating constitutional prohibitions.

On the merits there seems to be no good reason why the contract in issue should be condemned. It must be presumed that in making it the City authorities then acting, exercised,

according to their best judgment and ability, their statutory authority to provide the city and its inhabitants with water. By the contract, besides obtaining distribution of water to the city, its inhabitants and industries, which presumptively it was itself otherwise unable to make, it secured other valuable rights.

The grantee was obliged (Sec. 5; Rec. 4) to make extensions of the water works system on demand of the City Council to the extent at least of two thousand feet per annum. Extension was to begin within four months from the adoption of the franchise ordinance, and be completed to the extent of two thousand feet within six months thereafter. (Sec. 12; Rec. 5). No more (Sec. 9; Rec. 5) was to be charged for the water than was usually charged in Texas as towns of like size and the City acquired the right (Sec. 10; Rec. 5) at five year periods, to take over the distribution plant at a value to be fixed, in case of disagreement between the parties to the contract, by disinterested appraisers, nothing to be allowed for franchise rights.

While the State Courts declined to adopt the construction of the franchise ordinance and contract thereunder here contended for, where the question is whether there is legislative impairment of a contract contrary to the guarantees of the Federal Constitution this Court will decide whether there is a contract to be impaired, and its proper construction, independent of the State Courts.

Grand Trunk W. Ry. Co. vs. City of South Bend (33 Sup. Ct. Rep. 303) 227 U. S., 544.

Northern Pacific Ry Co. vs. Minnesota (28 Sup. Ct. Rep. 342-3) 208 U. S., 590.

Stearns vs. Minnesota (21 Sup. Ct. Rep. 73) 179 U. S., 223.
C. B. & Q. Ry. Co. vs. Nebraska (18 Sup. Ct. Rep. 513) 170 U. S., 57.
Mercantile Trust Co. vs. Columbus (27 Sup. Ct. Rep. 85) 203 U. S.,311-320.
St. Paul Gaslight Co. vs. St. Paul (21 Sup. Ct. Rep. 576) 181 U. S., 14-142-148.

It is no longer open to question that municipal legislation passed under supposed legislative authority from a state is wthin the prohibition of the Federal Constitution and void if it impairs the obligation of contracts, and if the franchise ordinance and contract under it herein in issue are valid, it follows that the subsequent ordinances of April 22nd, 1909, and of March 15th, 1910, (Rec. 10-11) to the extent to which they undertake to annul or repeal the franchise ordinance, and to repudiate the contract under it, are laws impairing the obligations of a contract within the meaning of the Federal Constitution.

Northern Pacific Ry. Co. vs. Minnesota (28 Sup. Ct. Rep. 343) 208 U. S., 583.
Mercantile Trust Co. vs. Columbus (27 Sup. Ct. Rep. 83) 203 U. S., 311-320.
St. Paul Gaslight Co. vs. St. Paul (21 Sup. Ct. Rep. 575) 181 U. S., 142-148.
Davis & F. Mfg. Co. vs. Los Angeles (23 Sup. Ct. Rep. 498) 189 U. S., 207-216.

If the franchise ordinance herein in controversy, and the contract under it, properly construed, had, and was intended to have reference only to distributing water from the City's lakes, then it certainly was not an exclusive grant to Morrison and his assigns to furnish water to the City of Ennis and

its inhabitants, and the principle upon which this case was decided in the State Courts has no application.

Furthermore, if the franchise ordinance and contract taken as a whole and read in the light of surrounding circumstances and settled rules of construction, is reasonably susceptible of being construed to have reference only to distributing water from the City's lakes, the Courts, to prevent a forfeiture, and avoid declaring a contract illegal, should adopt that construction, in which event the principle on which the State Courts based their decisions has no application to this case.

The authorities of the City of Ennis may have been willing to grant to Morrison and his assigns, as they did, the right to take and distribute water from the City's lakes, for the benefit of the City and its inhabitants, and all that might be necessary, subject to the previous rights granted the Railway Company, but there is nothing to indicate that they would have been willing to do more, and confining the grant at issue in this case to these lakes, the city is not precluded from seeking a different source of supply in case the lakes become insufficient, or fail to furnish water in sufficient quantity and of wholesome kind, by its own efforts, or through other parties.

In fact it appears from the record that before attacking the franchise grant here in issue the city authorities had begun efforts to procure a water supply from artesian wells, and that the supply from the lakes was precarious. It further appears that at the time of the trial, the city was being furnished water from its artesian wells, through a portion of the distribution plant of Plaintiff In Error, because of a then in-

sufficiency of supply from the lakes, and this arrangement was temporarily continued, with modifications, by the decree of the trial court. (Rec. 12:26:29.)

If this, instead of being a suit by the City of Ennis to forfeit the rights of the water company had been a suit by the water company to restrain the City from attempting to procure for itself and its citizens a water supply from other sources than the lakes, irrespective of any Constitutional question, and purely on the general state of the law as declared with, as we think, almost complete unnanimity, there would have been no right to recover, and if the grant would not have been held exclusive in favor of the water company it should not be so held to its injury.

But is the franchise grant herein in issue in fact exclusive under any proper rule of construction? We submit that it is not, and that the authorities cited on pages 13 and 14 of this Brief so show.

The case of the City of Brenham vs. Brenham Water Co., 67 Tex., 542, is the basis of the judgments rendered in the State Courts in this case. The decision in that case was rendered at a time when the Supreme Court of Texas had Appellate jurisdiction both as to law and facts, and if the case, properly considered, is anything more than a holding that under the facts the Court was of opinion that the parties intended to make an exclusive contract, and that being exclusive as a matter of fact, the constitutional prohibition, applied, the case stood solitary and alone in this holding until reaffirmed in this case.

We do not mean to assert that the case has not since been frequently cited in the Texas Courts to the general proposi-

tion that exclusive public service franchises may not be granted in Texas, but we do assert that never in Texas or elsewhere, so far as we have been able to discover, has the case been cited with approval, in support of the proposition that such words as were used in the franchise grant condemned in that case, as a matter of law, conferred exclusive privileges, until in this case.

This criticism, when made in the State Supreme Court, was not appreciated by the learned Judge, who rendered the opinion of that Court in this case, (Rec. 61), yet, with due defference, he failed, utterly, to refute it. He says that the doctrine of the Brenham case has been approved by the Supreme Court of Texas in Altgelt vs. City of San Antonio, 81 Texas, 436, 13 L. R. A., 383; City of Austin vs. Nalle, 85 Texas, 520; Edwards County vs. Jennings, 89 Texas, 621, and Hartford Fire Insurance Co. vs. City of Houston, Texas, 102 Texas, 317, 116 S. W., 36. (Rec. 60.)

Let us see to what extent the Brenham case was in fact approved in these cases. In none of them was any such rule of construction announced as in the Brenham case, if in fact that case held that the words of the grant under consideration of themselves imported exclusiveness as a matter of law.

In Altgelt vs. City of San Antonio, 81 Texas, 436, the Brenham case is cited (page 448 of the opinion), and it is said that the charters and contracts were substantially the same in the two cases. It will be seen by referring to page 446 of the opinion that the grant to the water company was the right of "supplying said city with water for fire protection, sanitary, public and domestic purposes; said company to use

the head of San Antonio river as a source of supply." The case actually went off on the right of a citizen and tax payer to a question of contract of this nature so long as the contract was recognized by the constituted authorities of the city, and such right was denied. If it had really been a question for the court whether the grants of the City of San Antonio and the City of Brenham were substantially the same, and the mind of the court had been directed specially to that question, we venture to suggest that a very wide difference would have been found, and that upon authority the court would have been bound to hold that the grants were different, and that the only exclusiveness in the grant to the San Antonio Water Company was as to the source of supply, to-wit, the head of San Antonio river.

In City of Austin vs. Nalle, 85 Texas, 520, it was attempted to enjoin the construction of the Austin dam, among other grounds, on the claim that the City already had a contract with a water company, by which it was provided with an adequate supply of light and water, and by which, it was contended, that the city had exhausted its power to procure water and light from any other source. The Brenham case is quoted simply as an authority that the city could not grant an exclusive right to furnish either water or lights, and that the contention that it, by existing contracts, had exhausted its powers could not be maintained.

In Edwards vs. Jennings, 89 Texas(618, the Brenham case is cited (page 620) to the proposition solely that an exclusive right to supply a town with water could not be granted but would be violative of the monopoly clause of the Constitution. In that case the grant in question was exclusive

in terms, and therefore the reasoning of the Brenham case had no application, and the case is itself questioned upon other issues.

In Hartford Insurance Company vs. City of Houston, 102 Texas, 317 and 116 S. W., 36, the city had entered into a contract with a water company for a water supply and had agreed not to grant to any person the right to furnish water for fire hydrants during the life of the contract, which was for 25 years, and the only question in this case pertinent to this was as to the binding force of that particular provision, which was held void under the monopoly clause of the constitution, the Brenham case being cited. Evidently in the opinion of the Supreme Court this case and Edwards vs. Jennings are cited purely to the proposition that such exclusive grants are violative of the constitution.

The State Supreme Court fails to cite City of Houston vs. Houston City Street Railway Co., 83 Texas, 548, which was cited in the Briefs in that Court. In that case the validity of a grant to a street railway company of the privilege of laying tracks in practically all streets of the City, was in issue, and it was claimed on behalf of the City that the grant was in excess of municipal power, both in respect to the extent of the right conferred and the time of its duration, which was thirty years. The Court on page 533 of the Report says:

> "It may be observed * * * that the franchise or privilege granted to the plaintiff by the City of Houston, though it extended to nearly all the streets of that city, is not of an exclusive character. The City by the terms of the grant is not prohibited from extending similar privileges to other railway companies. * * * The grant to the

plaintiff as extended by the City of Houston is not therefore void upon the ground that it confers an exclusive privilege, as it would be under the Constitution if it had, in fact, created a monopoly in favor of the plaintiff." citing the Brenham case.

It will be noted that in this grant the word "privilege" is used just as in the Brenham ordinance. The Court was as much bound to hold in the Houston case that this word implied an exclusive right as it was in the Brenham case, and to us it seems that the two cases are in direct conflict, and the Houston case really states the correct rule, sustained by an overwhelming weight of authority, that an exclusive grant is not to be presumed from mere construction, but can be conferred, if at all, only by direct language, or conclusive implication. It will be noted, too, that the Houston case is an authority against the proposition contended for both in the Brenham case and in this case, that such privileges as were granted in that case may not be conferred for a term of 30 years.

In the only case prior to this that has been before the Texas Supreme Court, since Edwards vs. Jennings, above cited, so far as we have been able to find, in which exclusiveness of the franchise was a question, is the case of Palestine Water Co. vs. City of Palestine, 91 Texas, 540, and though in that case the Brenham case is cited and relied on in the briefs (page 543 of Report) and by the terms of the grant, the right given seems to have been exclusive for fifty years, provided the grantee supplied a sufficient quantity of clear and wholesome water (page 544 of Report), the Brenham case is not noticed in the opinion, and the case was decided on its facts.

The opinion in the Brenham case appears really to be based on the conclusion of the Judge rendering it of what was in fact, the intention of the parties in making the contract being considered.

On page 551 of Report, near bottom of page, it is said, "Was it intended to make this right and privilege exclusive for that period of time. This must be ascertained from the language of the ordinance, the surroundings of the parties and the purpose to be accomplished," etc., and on page 553, about the middle of the page, it is said, "The language of the contract, the surroundings of the parties and their evident purpose, forbid the belief that they either intended to make the right and privilege of the water company other than an exclusive right to furnish and be paid for all the water the city and its inhabitants might need to have furnished through a system of water works for the full period of twenty-five years."

When the contract in issue in the Brenham case was made the city had no source of water supply, owned no water main and seems not to have been receiving, for municipal purposes, or for its citizens, water from any but private sources, and some fire cisterns. The supplementary contract spoken of on page 547 of Report was to "allow the fire department to fill the fire cisterns from any of the hydrants." Under these circumstances the city made a general contract which the court, looking to all the facts, held to be the grant of an exclusive right.

In this case the City had a source of water supply and some water main, from which through a distribution system owned by one of its citizens, it and its inhabitants and industries were

being supplied with water. By the contract made the city's water main of 8000 feet was leased to the grantee for the full term of the grant for $50.00 per month, and the right was granted to take all the water to be furnished under the contract from the city's lakes. The right to erect improvements contiguous to the lakes necessary to the contemplated water business was granted, also the right to distribute water to non-residents of the city, and by ordinance the source of water supply was protected. Had this state of facts been before the Court in the Brenham case is it probable that the conclusions of fact would have been the same? We cannot conceive that the learned Judge who rendered the opinion in that case would have been willing to hold, against the overwhelming preponderance of authority elsewhere, that the words of the grant in issue in that case, of themselves, imported exclusiveness.

However, this may have been, this Court is hampered in this case by no finding of exclusive intent in fact. Under the existing judicial system of Texas the intermediate Appellate Courts, the Courts of Civil Appeals have appellant jurisdiction, both as to fact and law. Their findings of fact are conclusive, but their conclusions of law are reviewable by the Supreme Court, on Writs of Error. In both the Court of Civil Appeals and in the Supreme Court this case has been determined on the face of the franchise ordinance itself, what we deem outside material facts, distinguishing this from the Brenham case, being ignored, but there are findings of all these facts (opinion Court of Civil Appeals, Rec. 38-44; opinion Supreme Court, Rec. 55-59). The Supreme Court, after stating the facts, expressly states that the questions presented are

purely of law Rec. 59; last line) and upon such questions this Court acts independently of the State Courts, and in accordance with its own views of legal principles, and we think it has practically already decided the vital questions at issue.

In the case of the City of Walla Walla vs. Walla Walla Water Company, (19 Sup. R., 77) 172 U. S. I., the facts were that by an act of the territory of Washington incorporating the city of Walla Walla the city had power "to provide a sufficient supply of water; to grant the right to use the streets of the city for the purpose of laying gas and other pipes intended to furnish the inhabitatnts of said city with light or water, to any person or association of persons for a term not exceeding 25 years * * * provided, always, that none of the rights or privileges granted shall be exclusive, or prevent the council from granting the same rights to others." The city was further given the power to erect and maintain water works, within or without the city limits, or to authorize the erection of the same, or to purchase or condemn water works already erected.

Under these charter powers, the city granted to the water company for a period of 25 years from date of the ordinance "the right to lay, place and maintain all necessary water mains, pipes, connections and fittings in all the highways, streets and alleys of said city for the purpose of furnishing the inhabitants thereof with water," and it was further provided that "for all purposes above enumerated said Walla Walla Water Company shall furnish an ample supply of good wholesome water for domestic purposes, including sprinkling lawns, at reasonable rates, to consumers, at all times during said period of 25 years." The contract was to be voidable upon the judg-

ment of a court of competent jurisdiction whenever there should be a substantial failure of such supply, or a substant should be a substantial failure of such supply, or a substantial failure on the part of the company to keep or perform the agreement on its part, accident or reasonable delay excepted, and until so avoided the City of Walla Walla agreed not to erect, maintain or become interested in any water works, except the ones in such contract referred to, saving the right of the city to take the water works at any time by condemnation and payment.

The contract contained a hydrant rental clause to run for the full period of 25 years, but after it had been in force, and the stipulated rentals paid, for about six years, the city passed an ordinance to provide for the construction of a system of water works of its own for the purpose of supplying the city and its inhabitants with water, and for the issuance of bonds to provide the necessary funds and the proposition so to do was submitted to a vote and carried by a sufficient majority of legal voters. The suit was to enjoin this action on the part of the city as violative of the franchise granted and the contract thereunder, and under the contract clause of the Federal Constitution the jurisdiction was upheld in the Federal Courts. The contention of the city was that it had exceeded its powers in authorizing the contract for a continuous supply of water and the payment of rentals for 25 years, and the contract was specially obnoxious in the stipulation that the City should not construct water works of its own during the life of the contract. The several objections to the contract were: (a) the contract creates a monopoly which, in the absence of an express grant from the legislature of power to do so, or such power necessarily implied, is void as in contravention of public policy.

(b) The contract is void as an attempt to contract away part of the governmental power of the city council. * * * * * *

The Court holds that the contract is question being expressly limited to 25 years, no attempt was made to grant an exclusive privilege to the water company, and further says (page 14 of Report).

> "Had the privilege granted been an exclusive one, the contract might be considered objectionable on the ground that it created a monopoly without express sanction of the legislature to that effect. It is true that in the City of Brenham vs. Brenham Water Company, 67 Texas, 542, a city ordinance granting to a water company the right and privilege for the term of 25 years of supplying the city with water, for which the city agreed to pay an annual rent for each hydrant, The Supreme Court of Texas held to be the grant of an exclusive privilege to the water company for the period named. The decision seems to have rested largely on the use of words 'privilege' and 'supplying,' words which are not found in the contract in this case. Without expressing an opinion on the point involved in that case, we are content to say that an ordinance granting a right to a water company for 25 years to lay and maintain water pipes for the purpose of furnishing the inhabitants of city with water does not, in our opinion, create a monopoly or prevent the granting of a similar franchise to another company. Particularly is this so when taken in connection with the further stipulation that the city shall not erect water works of its own. This provision is not devoid of an implication that it was intended to exclude only competition from itself and not from other persons whom it might choose to invest with a similar franchise."

It is further held that there was nothing in the argument or contention that the contract was void as an attempt to barter away the legislative power of the city council, and that

the stipulation in the contract that the city would not erect water works of its own during the life of the contract was good; that it was a reasonable provision, and that this provision taken in connection with the condemnation clause of the contract amounted to an agreement that so long as the contract was performed by the water company, the City would establish no water works of its own, save by condemning and paying for the plant of the company, and it appearing that there had been no judicial forfeiture of the rights of the water company, its contentions were sustained, and the City was prevented from building water works as contemplated.

The charter prohibition against granting exclusive privileges was as strong in the Walla Walla case as is the Constitution of Texas in that regard and in that case the stipulation was that the water company should furnish an ample supply of good wholesome water for domestic purposes including sprinkling of lawns and for the use of the City. As said by the Court in the case of Cunningham against City of Cleveland hereafter to be quoted, it is most difficult to reconcile this case with the Brenham case. While polite attempts are made to do this, the Walla Walla case, and that of Water, Light and Gas Co. vs. Hutchinson, 207 U. S., 385, together, we think decide every question here at issue and against the contentions that have been made on behalf of the Defendant in Error.

In Water, Light and Gas Co. vs. Hutchinson, the question involved was whether a city, under the laws of Kansas, could, as it attempted to do, grant an exclusive right and privilege for 20 years of supplying the City with water and electric current. By the general laws of Kansas, cities were giv-

en power to ordain or repeal any and all ordinances not repugnant to the constitution, deemed expedient for the good of the government of the city, the preservation of the peace and the benefit of trade, commerce and the health of the inhabitants, and was especially authorized to provide for and regulate the lighting of the streets, and to contract with any person, company or association for such purposes, and give such person, company or association the privilege of furnishing light for the streets, lanes and alleys of the city, for any length of time not exceeding 21 years, and, also, purchase, procure, provide and contract for the construction of water works and electric light and gas plants for the purpose of supplying such cities with water, light and gas for domestic and any and all other uses. Under these provisions of the general law, the grant in question, exclusive in its terms, for the period of 20 years was made, and was assailed on the ground that the laws in question did not authorize an exclusive grant. (Page 396 of Report.)

> On behalf of the city, its counsel said: "Language more explicitly expressing an absolute measure of power could hardly be framed. The power is given to light streets, to make contracts for lighting streets, and to confer the privilege of lighting streets for a specific term of years." And, further, counsel says: "It will be observed that the grant of power is to confer 'the privilege of furnishing light;' the definite article 'the' is used. Power to confer the privilege implies *ex vi termini* the exclusive privilege, not a fractional or communal privilege; the power conferred exists as a concrete and integral whole; and, therefore, the thing conferred must pass in its entirety. The City possessed the privilege of lighting its own streets as a function of its municipal authority. It was that privilege in its integral and exclusive form, which the legislature authorizes the city to confer."

It had already been said that grants to municipal corporations, like grants to private corporations, are subject to the rule of strict construction, and that the power to grant an exclusive privilege must be expressly given, or if inferred from other powers, must be indispensable to them, and that this principle was firmly fixed by authority. To the argument made above it is answered (Page 397 of Report):

> "We can not concur. The kind of privilege is defined, not the extent of it. It is exclusive of some persons, but not of all. It is exclusive of those who have not a grant from a proper authority. There are privileges which may exist in their full entirety in more than one person, and the privilege or franchise or right to supply the inhabitants of a city with light or water is of this kind. A grant of power to confer such privilege is not necessarily a grant of power to make it exclusive. To hold otherwise would impugn the cited cases in their reasoning. It would destroy the rule of strict construction. The foundation of that rule requires the grant of such power to be explicit, explicit in the letter of the grant, or if inferred from other powers or purposes, to be not only convenient to them but indispensable to them, and these conditions are imperative—too firm of authority to be disregarded upon the petition of equities, however strong."
>
> The holding was that there was no authority implied from the statute named to make an exclusive grant.

If, as said in Cunningham vs. City of Cleveland, 39 C. C. A., 211; 38 Fed., 657, it is most difficult to reconcile with the Brenham case the decision of this court in the Walla Walla case, we are of opinion that taking the Walla Walla and Hutchinson cases together, it is impossible logically to reconcile them with the Brenham case.

The questions here in issue have been before the Sircuit Courts of Appeals for the Fifth and Sixth Circuits.

In Bartholomew vs. City of Austin, (29 C. C. A. 569) 85 Fed. 359, a grant by the City of Austin to the City Water Company; the first section of which was, mainly, in the exact terms of the grant of the City of Brenham to the Brenham Water Company was before the court. The first section of that grant was:

> "There is hereby given and granted to the City Water Company the right and privilege for the term of 20 years from the date of the execution of this contract, of supplying the City of Austin, and the citizens thereof * * * * with water, either for domestic use or for the extinguishment of fires, etc."

The First Section of the grant to the Brenham Water Company, upon the wording of which, taken in connection with surrounding facts and circumstances, the opinion in the Brenham case is based, is:

> "That there is hereby given and granted to Brenham Water Company the right and privilege, for the term of twenty-five years from the date of the adoption of this ordinance, of supplying the city of Brenham and the inhabitants thereof with water for domestic or other uses and for the extinguishment of fires."

The First Section of the franchise ordinance in issue in this case and upon the wording of which the opinion of the State Supreme Court is practically based, is:

> "The said City of Ennis does hereby give and grant unto A. M. Morrison, a citizen of the City of Ennis, Texas, his heirs and assigns, for the term of thirty years from the date of the adoption of this ordinance the right and privilege to supply the City of Ennis and the inhabitants thereofe (and of the territory adjacent thereto) with water for domestic and other uses and for preventing and extinguishing fires."

Concerning the contract involved in the Bartholomew case the Court says (Page 575 of Report):

"The grant is not in terms an exclusive one, and so far as the language is concerned, there is nothing to hinder the City of Austin from erecting other and competing works, or from granting to others the right to use the streets, or from contracting with others for the furnishing of more water as the needs of the City may require. It is very well settled that in contracts with cities or municipalities conferring powers, grants or privileges on private corporations affecting the general rights and interest of the public, the grant or privilege must be clearly construed, all implications, doubts and ambiguities being resolved against the grant or privilege claimed," citing authorities. The Court further says: "There is a long line of cases that affirm the independence and freedom of contracts like the one under consideration from the objection that they are void because a supposed monopoly is embodied in them, and many are cited in the briefs; but a review of them is not essential to illustrate our views, which are that the contract forming the basis of the plaintiff's action in this case, can not and ought not to be construed as in any just sense granting an obnoxious exclusive privilege, or as granting to the City Water Company any monopoly, inhibited either by public policy or by the provisions of the Constitution of the State of Texas, wherein it is declared that 'Perpetuities and monopolies are contrary to the genius of free government and should never be allowed.' Ordinarily this would be conclusive in this case; but we find that five years after the rights in question were granted to the City Water Company, under a general state of law that such contracts were meritorious and valid, and after the induced and necessary capital had been invested, the works organized and accepted by the City of Austin, and negotiable bonds had been floated on the market, secured by mortgage on said works, with direct consent of the City of Austin, as evidenced by the provisions of the contract, the Supreme Court of the State of Texas in City of Brenham vs. Brenham

> Water Company, 67 Texas, 542, in dealing with a contract in all material respects similiar to the one involved in this case, held that, although no exclusive privilege was in terms granted, yet necessarily the effect of the contract was to grant an exclusive privilege, and, further, that the contract thus necessarily granting an exclusive privilege was the granting of a monopoly, in violation of the Constitution of the State of Texas. The opinion filed in the case by the learned Supreme Court was very elaborate, and purports to review the general jurisprudence on the subject; but for the reasons hereinbefore given, with all respects, we are compelled to differ from the reasoning and conclusion of the Court," and the franchise in that instance was sustained."

The State Supreme Court assumes that the opinion in the Bartholomew case is based on the fact that the contract in issue had been in force for five years before the Brenham case was decided, and bonds had been issued and were outstanding, and that therefore the opinion of Judge Pardee does not indicate in the slightest degree a want of due regard for the ruling of that court upon questions of local state policy, and State constitutional construction. (Rec. 63-64.)

It is true that Judge Pardee does refer to the facts mentioned by the Supreme Court, but these facts could not possibly changed the law of the case. Judge Pardee unquestionably holds that under the general state of the law contracts such as that being considered were meritorious and valid, and, speaking of the Brenham case, he expressly says, "for the reasons herein above given, with all respect, we are compelled to differ from the reasoning and conclusion of the court."

The State Supreme Court further adverts to the fact that when the Ennis contract was entered into, the rule laid down in the Brenham case had existed for a period of thirteen years, but ignores the fact that when the contract in this case was entered into the decisions of this Court and of Circuit Court of Appeals in the Walla Walla and Bartholomew cases, and in the case of Cunningham vs. City of Cleveland, had already been announced.

The learned Judge rendering the opinion of the State Court (Rec. 64) speaks of the opinion in the Brenham case as a ruling upon questions of local state policy, and state constitutional construction. With due respect, we think with Judge Pardee, that the questions involved are questions ruled by general principles of law, and that under a general state of the law, such contracts as that involved in the Brenham case, in the Bartholomew case, and in this case are meritorious and valid; do not confer exclusive rights nor do they create monopolies, and the Constitutional provision invoked in the several State Courts has no application. As said by Judge Pardee, there is a long line of cases, (and we have cited many of them) that affirm the independence and freedom of such contracts from the objection that they are void because a supposed monopoly is embodied in them.

In Cunningham vs. City of Cleveland, (39 C. C. A., 211) 98 Fed., 657, certain contracts granting the franchise of furnishing water and light for the period of 20 years to the residents of Cleveland, Tennessee, at certain prices, subject to the right of the City to buy the plant at a price to be fixed in a manner specified, at the end of any five years, was be-

fore the Circuit Court of Appeals for the Sixth Circuit. The contracts further provided that in consideration of the conveniences to be conferred upon the City and its inhabitants by the erection of the plant and the furnishing of water and light, the city agreed in one contract to rent for the term of 20 years, unless the contract was sooner terminated by its purchase according to its terms, 40 public hydrants; and by the other contract it agreed to rent 18 public lights; certain extensions at the request of the city were provided for, increasing proportionately the number of hydrants and lights, the city in case of such extensions to pay a certain sum additional for each hydrant and light furnished as required. The Court says (Page 217 of Report):

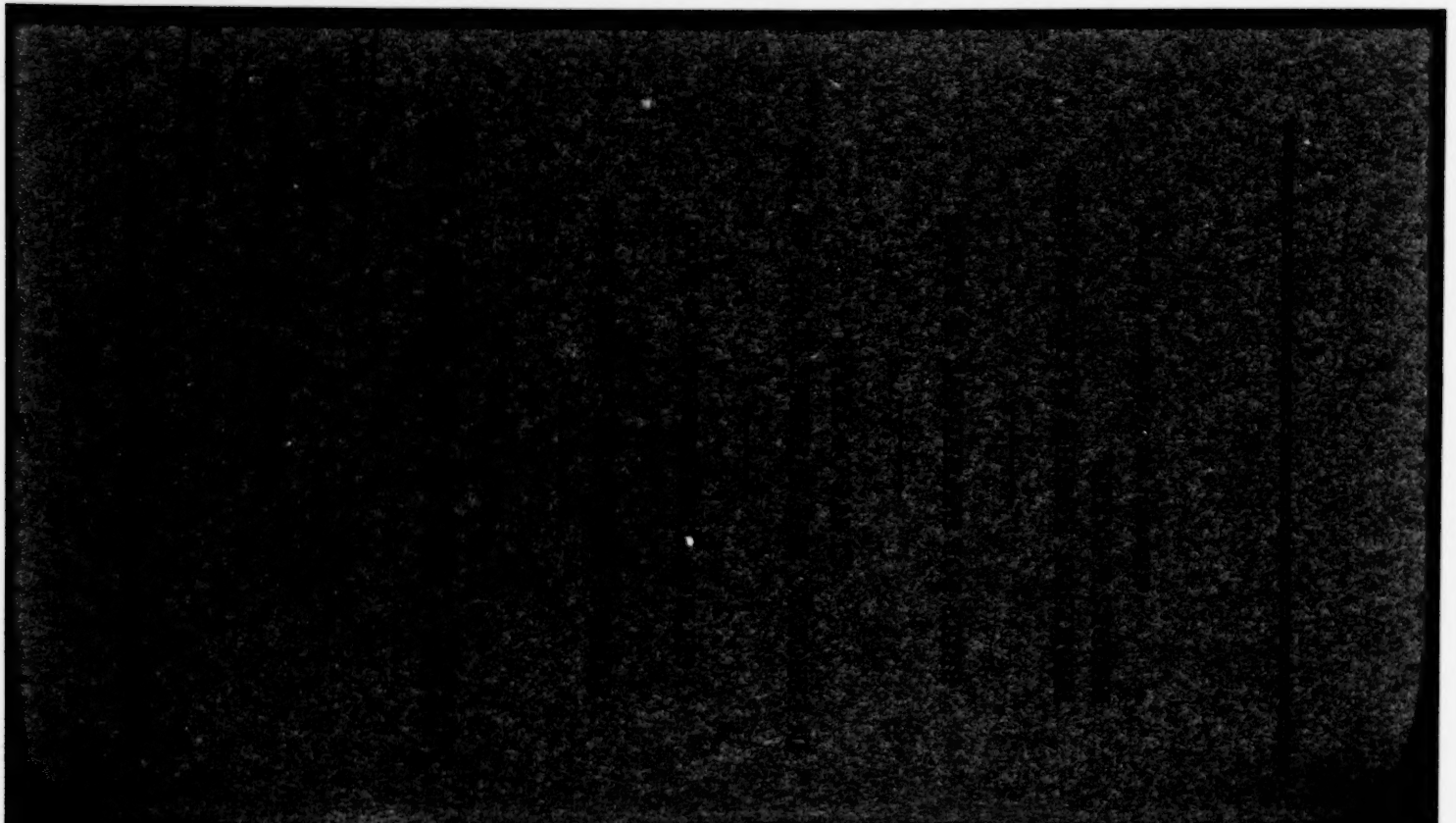
> "It is argued that this contract secured to the grantees the exclusive privilege of furnishing water and light to the grantor, and created a monopoly, which was beyond the power of the municipal board because not expressly conferred. * * * There is not one word in the contract forbidding the City of Cleveland from making exactly the same contract with another set of grantees. It is true the City binds itself to use for itself 40 public hydrants and 18 public lights, but it might at once, without the slightest infraction of that contract, agree to rent 40 other public hydrants and 18 other public lights from other persons or companies than the grantee of these franchises. * * * It is true that the making of these contracts, if the City fulfilled the obligation therein contained, rendered it unlikely that the City would authorize other persons or companies to enjoy similiar franchises, or would make similiar contracts with them; but this result arises from the nature of the subject matter and not from any contractual exclusion of such action by the City. Indeed, dissatisfaction with such contracts has not infrequently led municipal corporations to grant similar franchises to other persons. There is only one case which would support the

contention of Appellee upon this head. That is City of Brenham vs. Brenham Water Company, 67 Texas, 542. If that case can not be distinguished from the case at bar, it suffices to say that we do not agree with it, and we follow in this opinion the Circuit Court of Appeals of the Fifth Circuit in Bartholomew vs. City of Austin, 29 C. C. A., 568. The truth is that it is most difficult to reconcile with the Brenham case the decision of the Supreme Court of the United States in Walla Walla vs. Walla Walla Water Company, 172 U. S. I., for though the Supreme Court points one or two distinctions between the Brenham ordinance and the Walla Walla Ordinance, the main fact remains, that in each ordinance the City gave the water company the right to use the streets and furnish water for a period of years, and for the water to be furnished for strictly public use, agreed to pay a stipulated sum for the same period."

In this case there has been a contention that the franchise grant in question is vicious because of the hydrant rental provision embodied in Sec. 4 of the ordinance. (Rec. 3-4.) This contention is so thoroughly disposed of in the Walla Walla case, Cunningham vs. City of Cleveland, and Illinois Trust and Saving Bank vs. Arkansas City, 22 C. C. A., 171, and in Houston vs. Houston Street Railway Company, 83 Texas, 584, that it seems unnecessary to discuss it. It will be noted, however, that the hydrant rental section of the franchise ordinance herein in question does not, in terms, extend for the life of the grant, and no reason appears why the City of Ennis might not put an end to that part of the contract at the expiration of any reasonable period, and it does not appear that any additional hydrants were ever established under the provisions of Sec. 5 of the ordinance. (Rec. 5.)

We submit that the franchise grant herein in question was and is entirely legal and is a valid contract between the parties to this case and that the subsequent ordinances, undertaking to invalidate said contract, or to declare it invalid, are laws impairing the obligation of a contract; that the State Courts have erred in holding to the contrary, and that their judgments should be reversed, and this case remanded to the State Trial Court for disposition, if desired, upon the issues not determined by the litigation to this time.

JACK BEALL
and
G. C. GROCE,
Attorneys for Plaintiff In Error.



INDEX.

Proposiition I (as to jurisdiction) 2

Discussion 2-7

Proposition II (as to jurisdiction) 7

Discussion 7-10

Proposition III (as to State Laws) 10

Discussion 10-43

Art. 1. Sections 17 and 26, Constitution of Texas 10

Art. 12. Sections 3 and 5, Constitution of Texas 11

Art. 48. Revised Statutes of Texas, 1895 11

Parallel of Ennis and Brenham Franchises 15-19

Parallel of Ennis and Brenham Charters 20

Proposition IV (as to influence of State Decisions) 43

Discussion 43-45

Proposition V (as to County) 45

Discussion 45-65

Conclusion VI. 65-66

TABLE OF CASES CITED.

Altgelt vs. San Antonio, 81 Texas 21-22
Atlantic City Water Works vs. Atlantic City, 48 N. J. Law, 378 56-57
Bamberger vs. Schoolfield, 160 U. S., 149, 357 32-33
Bank of Augusta vs. Earle, 13 Pet. 519, 594 32-33
Bartholomew vs. City of Austin, 85 Fed. 359 59-61
Bucher vs. Cheshire R. Co. 125 U. S. 555, 581, 584 32-33
Burgess vs. Seligman, 107 U. S. 20 44
City of Austin vs. Nalle, 85 Texas, 520 (549) 22
City of Vicksburg vs. Vicksburg Water Co., 202 U. S. 553 55
Commercial Bank vs. Buckingham, 5 How. 317 37-38
Cunningham vs. Cleveland, 98 Fed. 657 59
Detroit vs. Osborne, 135 U. S., 492, 498, 499 32-33
Douglass vs. Pike Co., 101 U. S. 667-88 37
Edwards County vs. Jennings, 89 Texas, 618 23
Elmendorf vs. Taylor, 10 Wheat. 152, 159 32-33
Etheridge vs. Sperry, 139 U. S., 266, 276, 277 32-33
Fairfield vs. Gallatin Co., 100 U. S. 47-55 36-37
Freeport Water Company vs. City of Freeport, 180 U. S., 587 27-30
Gardner vs. Michigan C. R. Co., 150 U. S. 349, 357 32-33
Great So. Hotel Co. vs. Jones, 193 U. S. 532 44-45
Green vs. Lessee, 6 Peters, 291, 297 38-41
Griffin vs. State of Conn., 218 U. S. 563 34
Gulf & Ship Island Railroad Co. vs. Hewes, 183 U. S., 68 26-27
Hamilton Gas Co. vs. Hamilton City, 146 U. S. 258 54
Hartford Fire Insurance Co. vs. Houston, 110 S. W. 973 (977) 23-24
Hartford Insurance Company vs. Houston, 116 S. W. 36 24-26
Hartford Fire Insurance Co. vs. Chicago, Milwaukee & St. Paul Ry. Co., 175 U. S. 91 32
Helena Water Works vs. City of Helena, 195 U. S. 383 55
Hill vs. Atlantic & N. C. R. R. Co., 143 N. C. 539 41-43
Hurley Water Co. vs. Vaughn, 91 N. W. 971 (Wis) 58
Illinois Trust & Savings Bank vs. Arkansas City, 76 Fed. 271 57
Jones vs. Carter, 101 Southwestern, 514 23
Joplin vs. Light Co., 191 U. S. 150 56
Little Falls Co. vs. Little Falls, 102 Fed. 663 58-59
Long Island Water Supply Co. vs. Brooklyn, 166 U. S. 685 51-52
Louisiana vs. Pilsbury, 105 U. S. 278-302 35-36
Mead vs. Portland, 200 U. S. Rep. 148 44-45
Missouri, K & T. Trust Co. vs. Krumseig, 172 U. S., 351 32-33
Murray vs. Pocatello, 226 U. S. 318 41
New Orleans vs. La., 179 U. S. 622 43
Oconto Water Co. vs. Oconto, 105 Wis. 76 (80 N. W. 1113) 57-58
Old Colony Co. vs. City of Omaha 230 U. S. 100 33-34
Pleasant Twp. vs. Aetna Life Ins. Co., 138 U. S. 67 44
Stein vs. Bienville Water Supply Co., 141 U. S. 67 53
Sioux City Terminal R. & Warehouse Co. vs. Trust Co., of N. A., 173 U. S., 99 32-33
Scott vs. Jones, 5 How. 339-41 38
Syracuse Water Co. vs. City of Syracuse, 116 N. Y. 167 61-62
Taylor vs. Ypsilanti, 105 U. S. 60-73, 26 L. ed. 1012 35
Union National Bank vs. Bank of Kansas City, 136 U. S. 223, 235 32-33
Valparaiso vs. Gardner, 49 Am. Rep. 416 57
Vidal vs. Philadelphia, 2 How., 127 197 32-33
Waco Water & Light Co. vs. City of Waco, 27 S. W. 675 62
Wade vs. Travis County, 174 U. S., 499 32-33
Walla-Walla vs. Walla-Walla Water Co., 172 U. S. 1 51
Water Co. vs. Hutchison, 207 U. S. 385 52-53
Warburton vs. White, 176 U. S., 484 30-32
Yazoo R. R. vs. Adams, 181 U. S. 580 43

No. 503

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1913.

ENNIS WATER WORKS, Plaintiff in Error

vs.

CITY OF ENNIS, Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF TEXAS.

BRIEF FOR DEFENDANT IN ERROR.

The jurisdiction of this court is invoked by the plaintiff in error upon the theory that the contractual obligation of a water franchise granted to the assignor of the plaintiff in error by the city of Ennis has been impaired by certain ordinances passed by the municipality since the date of the original grant, and which ordinances, it is claimed, the state courts have erroneously upheld.

Defendant in error denies that this court has jurisdiction, asserting that in fact no real federal question is shown in the record, and says that if this court has jurisdiction that the issues actually decided in the State court were correctly there decided.

The determination of the matter of jurisdiction as well as the merits of the controversy, should this court ever reach the merits, depend upon the character, interpretation and construction of the franchise grant.

I.

PROPOSITION.

Where jurisdiction of the court is invoked under the contract clause of the Constitution, on error proceeding from the State courts, it must affirmatively appear from the whole record that the decision of the State court necessarily amounts to a holding that a law of the State of some authorized body acting under its authority, enacted since the making of the contract in question, purporting to impair such contract, or necessarily having such effect, is in the opinion of the State court, a valid law.

DISCUSSION.

The city of Ennis granted to A. M. Morrison a water franchise March 19, 1900. He assigned it to the Ennis Water Works, the present plaintiff in error.

The state courts have held that the franchise was void from the beginning.

Plaintiff in error asks this court to review the decisions of the State court and to uphold the franchise.

As will be elaborately and fully developed later in this brief, the franchise was void from the beginning **if tested by the constitution and the statutes of the State in force when the contract was made, as such constitution and statues had been construed, interpreted and applied by the Sureme Court of Texas prior to the date of the franchise in question,** (City of Brenham vs. Brenham Water Co., 67 Tex. 542).

The Supreme Court had held, thirteen years before, discussing a water franchise practically identical with the one here involved, 1st that the grant was exclusive and tended to the creation of a monopoly, and was therefore unconstitutional; 2nd, that its duration was unreasonably long, and 3rd, that the charters of cities of the class here in question did not warrant the granting of such franchises.

The "laws" complained of as being in violation of the contract clause of the constitution, consisted of municipal ordinances passed by the city of Ennis in 1909-1910, which refer to the old void franchise, recite its illegality, declare its nullity on account of its original vice and also because of subsequent breaches, and direct attorneys of the city to secure a judicial determination of such nullity.

The real intent and only effect of these ordinances was to direct resort to the courts in order to have the nullity of the franchise ascertained and declared.

The Supreme Court of Texas in its opinion in the present case agrees thoroughly with the statement made in the last preceding paragraph, for nowhere in its opinion does it ground its action in anywise upon the ordinances referred to, directing the prosecution of the present action. The whole inquiry on the part of the State court was as to the original

illegality of the franchise itself and no vitality is claimed for the suit authorization ordinances. The state court neither upholds nor invalidates the ordinances authorizing suit to be brought. They were inconsequential and collateral to the real inquiry. Their validity was not insisted upon by the City of Ennis, nor disputed by the Ennis Water Works, except in an incidental way, the real question being the original legality of the franchise itself.

The State court being of opinion that the franchise was void from the beginning, declared its invalidity because of its inherent illegality and drew no support from the ordinances referred to.

A few pertinent quotations from the opinion of the State Supreme Court show conclusively that the State court neither affirmed nor denied the recent ordinances for the good and sufficient reason that it considered that the questions of law had been quite clearly and finally settled in this State long before the contract here in suit was made. The courts says:

> "If this court is to adhere to the holding in the Brenham case, then we are forced to the conclusion that the judgment of the Court of Civil Appeals should be affirmed, for there is no possible theory upon which this case can be distinguished from the Brenham case. This statement will receive verification by a comparison of the two contracts as set out in the opinions in the two cases.
>
> "The Brenham case upon the questions arising in this case, is the leading authority in this State, and since its rendition not only has it been approved in its announcement of the general principle that contracts by municipalities granting exclusive rights and privileges for long

periods of time are contrary to the constitution and general policy of the law of this State, **but also it has been approved as announcing a correct rule of construction placed upon specific language. To such an extent has that case been cited, discussed and approved, not only as to the relation of the general principles of law announced against monopolies and perpetuities, but as to the legal effect to be given the language in which the contract is couched, that we are not willing to say the interpretation there given the language granting the right and privilege for a great length of time to furnish and supply the city and its inhabitants with water, has not become, at least in this jurisdiction, a rule of construction worthy to be observed and adhered to."**

"However, we do not feel called upon to enter into any further discussion of the subject, or nature of the contract in this case, as it has been construed by the Brenham case, which authority has stood the acknowledged law of this State for twenty-five years. At the time the contract in the case at bar was entered into the Brenham case had been promulgated for over thirteen years and had been approved by all the cases theretofore cited. It had placed upon a similar contract a rule of construction and announced the general policy of the law of this State, that was well known to its general people. No rights could have innocently accrued to the plaintiff in error demanding a change of the law to meet a great and imperative necessity. If a harsh rule of construction had been announced it was not placed under a bushel, but set upon a hill. Such contract had been declared repugnant to the constitution and the provisions of that instrument declaring monopolies and perpetuities contrary to the genius of a free government had received a definite construction."

In view of these facts can it be fairly said that the plaintiff in error has lost its water franchise because of ordinances passed subsequent to the contract? Must it not rather be said that plaintiff in error has lost its water franchise because it never had a legal grant in the first instance?

We submit that the latter is a correct statement and that the State court based its whole disposition of this case upon grounds which destroy the contention of plaintiff in error that the recent ordinances have impaired its contract.

If on a fair scrutiny of this record it appears that the decisions of the State court can be supported upon grounds other than Federal, this court will not entertain jurisdiction, but will assume that the decision of the state court upon non-federal grounds was correct, and that, being correct, it sufficiently disposed of the controversy without requiring action by this court.

To say that under laws in force when the franchise was granted, as interpreted by the highest tribunal of the State, the contract provided for exclusiveness and was void, is certainly a sufficient non-federal basis to support the action of the state court. It was a matter peculiarly within the province of the State court to decide. Its own constitution and statutes were involved. Its own creature, a municipal corporation whose territory was a part of its domain was to be effected. The question was local in its nature. The contract was made in Texas, and its performance was necessarily tied to easements and res in Texas. When the franchise was granted the laws in force and the interpretation given those laws by the State court, constituted a part of the franchise itself. No federal law was involved. The contract meant what the state laws

and state decisions then said it meant, and it is certainly not within the province of this court to reconstruct the contract, ascribe to it a meaning different from that which would be given to it if it was read in the light of the law of the State in force when it was made, as expressed by the highest court of the state, and then, having reconstructed the contract, to give it a meaning and effect quite the contrary to that which was given to it by the applicable local law when the contract was made.

II.

PROPOSITION.

This court will not take jurisdiction where from the whole record it appears that the federal question urged has been substantially foreclosed by prior decisions. In such case the federal question is purely theoretical and this court will not interfere.

DISCUSSION.

The principles of law involved have been so frequently declared that they are no longer open to discussion. It cannot fairly be urged that there remains any open federal question, or that this case discloses such a question. The Supreme Court of Texas had settled the local law controlling this contract before the contract was made. Those decisions interpreting the Texas constitution and statutes became a part of the very franchise now before this court. Indeed, the very language used in the present franchise was language which was specifically discussed and defined by the State Supreme Court in the earlier decisions. The court had said that the

language imported exclusiveness, monopoly, perpetuity and illegality. The use of such language in the present franchise, after the Supreme Court of Texas had declared such language to import illegality, necessarily had the effect of giving to the contract using such language the vice of illegality. No nice question of construction or interpretation is involved. The contract is not even cloaked with apparent distinctions.

It is elementary that this court will follow constructions which the state courts have placed upon its own constitution and statutes.

Supreme Lodge, K. of P. vs. Meyer, 198 U. S. 508;
First Nat'l Bank vs. Ayres, 160 U. S. 660;
Wilson vs. North Carolina, 169 U. S. 586;
Kipley vs. Ill., 170 U. S. 182;
N. Y. Central Ry. Co. vs. Miller, 202 U. S. 584;
Commissioners vs. Bancroft, 203 U. S. 112;
Lambert vs. Barrett, 159 U. S. 660;
Union Nat'l Bank vs. Louisville, 163 U. S. 325;
Shoshone Min. Co. vs. Rutter, 177 U. S. 505;
West vs. La., 194 U. S. 258.

It is elementary that the construction placed by the highest court of the state upon its own constitution and statutes is regarded as a part of the statute itself, as much so as if incorporated in terms in the very text of the legislation.

Machine Co. vs. Gage, 100 U. S. 676;
Bouserman vs. Blount, 147 U. S. 647;
Bucher vs. Cheshire Ry. Co., 125 U. S. 555;
Morley vs. Lake Shore R. R., 146 U. S. 162;
Douglass vs. Pike Co., 101 U. S. 677;
Weightman vs. Clark, 103 U. S. 256;
La. vs. Pilsbury, 105 U. S. 278;

Lee Co. vs. Rodgers, 7 Wallace 181;
Fairland vs. Gallatin, 100 U. S. 47;
Shelby vs. Guy, 11 Wheat. 361.

As said in the case last cited, "that the statute laws of states must furnish the rule of decision of this court, so far as they comport with the Constitution of the United States, in all cases arising within the respective states, is a position that no one doubts. Nor is it questionable that a fixed and received construction of their respective statute laws of their own courts make in fact a part of the statute laws of the country, however we may doubt the propriety of that construction. It is obvious that this admission may at times involve us in seeming inconsistencies, as where states have adopted the same statutes and their courts differ in the construction. Yet, that course is necessarily indicated by the duty imposed upon us to administer as between certain individuals the laws of certain states according to the best lights we possess of what those laws are."

It is elementary that the decision of the state courts construing municipal ordinances, or holding them to be consistent with the state constitution and laws, is binding on the Federal court. If a decision that the ordinances are valid is binding upon the Federal court, a decision that they are invalid is binding upon it for the same reasons.

Meade vs. Portland, 200 U. S. 148;
Miller vs. Ammon, 145 U. S. 421;
Yickwo vs. Hopkins, 118 U. S. 556;
Flanagan vs. Sierra Co., 196 U. S. 553;
Lombard vs. West Chicago Park Com., 181 U. S. 33;
Crowley vs. Christenson, 137 U. S. 86.

It is elementary that a supposed federal question is not substantial enough to justify this court taking jurisdiction when the question urged has already been settled by this court or by courts whose opinions on the point at issue are deemed to be authoritative and final in this court.

Applying the foregoing elementary principles we urge that there is nothing in the present record that justifies this court taking cognizance of this controversy.

III.

PROPOSITION.

Should jurisdiction be taken, this court will construe the contract involved in the light of and in connection with the state constitution, laws and judicial decisions, embodying the law of the state in force at the time the contract was made. This court will follow the state decisions in determning the operation and effect of the contract where from those decisions it appears that the contract in question was illegal when made and that it has not since become vitalized.

DISCUSSION.

At and prior to the execution of the contract in controversy here, there were in force the following pertinent provisions of the Constitution of the State of Texas:

> Art. 1, Sec. 17.—"No irrevocable or uncontrollable grant of special privileges or immunities shall be made, but all privileges and franchises granted by the legislature, or created under its authority, shall be subject to the control thereof."
>
> Art. 1, Sec. 26.—"Perpetuities and monopolies are contrary to the genius of a free government, and shall never be allowed."

Art. 12, Sec. 3.—"The right to authorize and regulate freights, tolls, wharfage or fares, levied and collected or proposed to be levied and collected by individuals, companies or corporations, for the use of highways, landings, wharves, bridges and ferries, devoted to public use, has never been and never shall be relinquished or abandoned by the state, but shall always be under legislative control and depend upon legislative authority."

Art. 12, Sec. 5.—"All laws granting the right to demand and collect freight, fares tolls or wharfage, shall at times be subject to amendment, modification or repeal by the legislature."

Pursuant to constitutional authority, the legislature, by a general law, provided for the creation of municipal corporations, and defined their powers. The Code of 1895 was in force at that time, and Article 418 thereof defines the powers of the city with respect to making water contracts, as such articles is the sole fountain of its authority in that respect. It reads as follows:

"Art. 418.—To provide, or cause to be provided, the city with water, to make, regulate and establish public wells, pumps and cisterns, hydrants and reservoirs, in the streets or elsewhere, within said city, or beyond the limits thereof, for the extinguishment of fires and to prevent the unnecessary waste of water."

These same constitutional provisions and the quoted legislation thereunder were in force in the year 1884, and in that year the City of Brenham, Texas, attempted to grant to a water company there located a franchise practically identical with the franchise here involved. After the date of grant, the

City of Brenham contested its validity upon substantially the same grounds that are urged by this defendant in error against the franchise granted by it to A. M. Morrison. The decision of the Supreme Court of Texas, disposing of that litigation, is reported in Volume 67, Texas Reports, page 542, (City of Brenham vs. Brenham Water Company). That case, (decided in 1887), was and is the leading precedent in Texas interpreting water franchise contracts and construing the laws of Texas relating thereto. In addition to its general importance, it is of special importance in the case at bar, because the contract discussed and disposed of by it is, as already stated, identical with the Ennis contract.

The volume containing the decision in the Brenham case was copyrighted and printed, and presumptively in the hands of the profession, in the year 1887, thirteen years before the Ennis franchise was granted. The Brenham case, therefore, was as much the law of the land when the Ennis contract was made as was the Constitution of Texas and the statutory laws in force. Its definitions and interpretations of language used in each of these contracts, and the applications it makes of the constitutional and statutory law in force, leaves no doubt in the open mind as to the Texas law in force at the time of the Ennis contract, and its deadly effect upon that instrument.

The following significant paragraphs that appear in that important decision, state more vigorously and clearly than we can the principles involved:

> "Taking all laws into consideration, we cannot doubt the power of the city to make some contract through

which the city might be furnished with water. It becomes necessary, for the proper determination of this case, to ascertain the character of the contract on which the rights of the parties depend. The subject matter of the contract was one over which the city had control solely under the power confided to it as a municipal government, to be exercised for the public good, and not under any private corporate right or proprietorship. The first section of the ordinance professes to give and to grant a right and priviledge to the water company to supply the city and its inhabitants with water for the period of twenty-five years.

"Was it intended to make this right and privilege exclusive for that period of time? This must be ascertained from the language of the ordinance, the surroundings of the parties, and the purpose sought to be accomplished. The ordinance, in terms, professes to give and to grant a right to do certain things, and therefor, to receive certain benefits for a quarter of a century, i.e., to confer a claim to do certain things, and to receive a fixed compensation on which may be enforced for that period.

"It not only professes, in general terms, to confer such a right, but, as if to emphasize it, and to fully illustrate the character of right intended to be granted, it terms it a *priviledge*. The word 'priviledge', as used in the ordinance, is evidently not used in the technical sense in which it is used in the civil law, or even under the common law, where used in the sense of 'priority', but was intended to be given its ordinary signification, meaning a right peculiar to the person on whom conferred, not to be exercised by another or others.

"This right is to supply the city and its inhabitants with water, for their varied use for twenty-five years,

at fixed prices in enumerated cases, and at such prices as the water company and inhabitants may agree upon in other cases. The word 'supplying' must be considered in its connection with a view to ascertain whether it was used in its primary sense or in one more restricted; and, so considered, we can have no doubt that it was used in its primary sense, intending thereby to give the water company the right and priviledge to furnish to the city and its inhabitants what water might be needed to be furnished through such a system.

"In the ordinance under consideration, it can mean no less than to furnish all the water the city and its inhabitants may need to have furnished under the power given to the city through its charter, and this for the period of twenty-five years. It would do violence to the context to give to the word any other meaning. If nothing more appeared than we have considered, to give character to the contract and to illustrate the nature of the right intended to be secured through it, it seems to us that there is no escape from the conclusion that the parties contracted and intended to contract that the right of thet water company should be exclusive.

"The fifth and sixth sections of the ordinance, however, if there were doubt, it seems to us would remove it. The water company obligated itself to erect and maintain a given number of fire hydrants on the mains which it absolutely agreed to put down, and for the use of these the city agreed to pay it the sum of three thousand dollars per year for the period named. It further obligated itself to extend its mains, if requested to do so, by the city, and upon each mile of such extension to erect not less than ten fire hydrants, for each one of which the city promised to pay a rental of sixty dollars per annum, as provided in the fifth section."

"The language of the contract, the surroundings of the parties and their evident purpose, forbid the belief that they intended to make the right and priviledge of the water company other than an exclusive right to furnish an be paid for all the water the city and its inhabitants might need to have furnished through a system of waterworks for the full period of twenty-five years."

The pertinent provisions of the Constitution of Texas, in force when the Brenham case was decided, stand unchanged today. The same is true as to the pertinent legislation.

The startling similarity between the Brenham contract, which was held to be an illegal contract in 1887, and the Ennis contract, now before this court, is made visual by the parallel column illustration which follows:

Brenham Contract.	Ennis Contract.
"Sec. 1. There is hereby given and granted to the Brenham Water Company the right and priviledge for the term of 25 years from the date of adoption of this ordinance, of supplying the City of Brenham and the inhabitants thereof with water for domestic or other uses and for the extinguishment of fires."	Sec. 1. The City of Ennis does hereby give and grant unto A. M. Morrison, a citizen of the City of Ennis, Texas, his heirs and assigns, for the term of 30 years from the date of the adoption of this ordinance, the right and privilege to supply the City of Ennis and the inhabitants thereof (and of the territory adjacent thereto) with water for domestic and other uses and for the purpose of extinguishing and preventing fires."
"Sec. 2. The said company is hereby authorized to establish, construct, maintain and operate the said works in or adjacent to the City of Bren-	"Sec. 2. The said A. M. Morrison his heirs and as-

Brenham Contract.
(Continued).

ham; to receive and store, conduct and distribute water through the city; to construct and maintain and pipe through all the streets, alleys, lanes, public grounds and all places under the control of said City of Brenham," * * * etc.

Sec. 3 relates to the mileage of mains and the location, size and quality thereof.

Sec. 4 provides that the water company shall erect 35 hydrants (this is not duplicated in the Ennis contract because the water supply system was already in when the Ennis contract was made).

Sec. 5. The City of Brenham hereby agrees to rent and does rent to the said Brenham Water Company 35 double nozzle fire hydrants, located by authority of said city upon the mains and pipes within said city for the extinguishment of fires, at a rental of $3000 per annum, payable quarterly, on the first day of January, April, July, and October in each year. Said ren-

Ennis Contract.
(Continued.)

signs, is hereby authorized and empowered to establish, construct, maintain and operate a system of waterworks in or adjacent to the City of Ennis, to receive, take and store, conduct and distribute water through said city and adjacent territory, to construct and extend mains and pipes through all the streets, alleys, public grounds and all places under the control of the City of Ennis," etc.

Sec. 3 substantially duplicates the concluding clauses of Sec. 2 of the Brenham contract.

Sec. 4. The City of Ennis hereby contracts with the said A. M. Morrison, his heirs and assigns, and agrees to rent and does rent of him 35 double nozzles fire hydrants as the same are now located, for extinguishing fires, at a rental of $1200 per annum, payable monthly in advance. And the City Council, for the purpose of providing for the payment of such hydrants rental, shall levy, collect and appropriate

Brenham Contract.
(Continued).

tal shall commence when the city is notified that said hydrants are ready for use and shall continue during the full term specified in this ordinance and for the purpose of providing for the payment of said hydrants rental coming due under the provisions of this contract, a city ordinance shall levy, collect and appropriate annually a sufficient sum of money to cover the amount becoming due on this contract.

Sec. 6 binds the water company to make extensions as ordered by the City Council.

Sec. 9. City of Brenham reserves the right to purchase the water supply system at the expiration of ten years or at any time thereafter at a valuation to be fixed by appraisal.

Sec. 10 fixes basis upon which the water company may issue bonds. (This is not duplicated in the Ennis contract because it was a complete system, already financed, before

Ennis Contract.
(Continued.)

a sufficient sum of money to cover the amount to become due under this contract.

Sec. 5 makes similar provisions concerning extensions, binding the city to pay said Morrison a rental of $40 each per annum "for additional hydrants," payable in the manner, at the same time and by the means provided in the preceding section.

Sec. 10 makes similar reservations of a right to the City of Ennis to purchase the water supply system at the expiration of five years or in periods of five years thereafter, and provides for fixing value by appraisement.

Sec. 12 provides that A. M. Morrison shall commence the extension of water works system within four months from the adoption of said ordinance and complete same to the extent of 2000 feet within six months thereafter.

Sec. 13. "This ordinance shall be a contract by and between the City of Ennis and

Brenham Contract.
(Continued).

the contract under consideration was made.)

Sec. 12 provides that the water company shall commence construction of its system within three months from the date of the adoption of the ordinance and complete same within six months thereafter.

Sec. 14. "This ordinance shall be a contract by and between the City of Brenham and the Brenham Water Company, their successors and assigns, and shall be binding on both parties thereto, provided said company shall file with the City Clerk its acceptance of the same in writing within five days after the passage of the same."

Ennis Contract.
(Continued).

the said A. M. Morrison, his heirs, successors and assigns, and shall be binding upon both parties hereto, provided said A. M. Morrison shall file with the City Secretary his acceptance of the same in writing within ten days after adoption hereof. The Mayor and City Secretary are hereby authorized and directed to sign and acknowledge such paper or papers as may be necessary to bear out any and all parts hereof."

Sec. 7. "The City of Ennis hereby grants to the said A. M. Morrison, his heirs or assigns, the right and priviledge to take all the water that may be required for the purposes above enumerated from the reservoirs of said lakes situate as follows (describing two lakes), together with right-of-way through all the grounds adjacent to said lake and owned by the city, subject to the contract heretofore entered into by and between City of Ennis and H. & T. C. Railway Company, with refer-

Ennis Contract.
(Continued.)

ence to use of water by the said railway company out of said lake.

"The further priviledge is granted to the said Morrison, his heirs, successors and assigns, to enter in and upon said tract of land upon which said reservoirs are situated and to erect thereon machinery and improvements necessary for the conduct of said water business."

Sec. 8 "The City of Ennis, in consideration of the sum of $50 per month, payable to it on the first day of each month, in advance, hereby lets and leases to the said A. M. Morrison, his heirs and assigns, during the term of this contract, about 8000 feet of 8-inch water mains belonging to said City of Ennis, and laid by it from the pumping station at said New Lake to a junction with its mains near the standpipe."

Further deadly parallels may be drawn. The City of Brenham was incorporated under a special law, the City of Ennis under the general law. Under both laws, however, the

Legislature defines, in almost identical language, the power to be exercised by these respective municipalities in making water contracts.

City of Brenham Charter.

Sec. 5, Art. 24 gives the city power "to provide the city with water, to make, regulate and establish wells, pumps and cisterns, hydrants and reservoirs in the streets or anywhere within said city or beyond the limits thereof for the extinguishment of fires and convenience of the inhabitants, and to prevent unnecessary waste of water."

City of Ennis Charter.

Art. 418, Revised Statutes, 1895, empowers a city incorporated under the general laws "to provide or cause to be provided, the city with water; to make, regulate and establish public wells, pumps and cisterns, hydrants and reservoirs in the streets or elsewhere within said city or beyond the limits thereof for the extinguishment of fires and the convenience of the inhabitants and to prevent the unnecessary waste of water."

The laws under which the Brenham Water Company was incorporated, comprising Articles 629 and 630 of Revised Statutes of 1879, measure the power of water supply corporations and are found unchanged in Revised Statutes of 1895 as Articles 705 and 706 and are still unchanged. The Article 418 quoted is depended upon as giving to the City of Ennis the astonishing power to tie its hands and the hands of its people for thirty years; to delegate to the water company the use of its entire water suply for a like period; to bind itself to pay during said time the sum of $36,000.00 absolutely and its people probably ten to twenty times that

amount and to throw open to the exploitations of the water company all its streets, highways and all other properties.

The careful reading which the decision of the Court in the Brenham case merits will convince the candid mind that the Supreme Court gave to the Brenham case a profund consideration, and grave research, and pronounced deliberately views worthy of the important questions involved. It is the leading case. Its authority would alone be sufficient in any Texas court. However, as if to strengthen its value as a storehouse of municipal statutory and constitutional law, our courts are constantly reaffirming its authority.

Altgelt v. San Antonio, 81 Texas, considers another exclusive water franchise and, referring to the Brenham case, uses the following language:

> "In so far as the first question above mentioned is involved, there is no material distinction between this case and that of the City of Brenham versus The Water Company, 67 Texas, 545, where it was decided. Without attempting to enumerate the different provisions of the contracts respectively entered into these cities and the sections of their charters authorizing said cities to enter into contracts to supply their inhabitants with water, and without citing the statutes which were looked to in that case in deciding this question, it will be sufficient to say that said charters and contracts are substantially the same, and the statutes referred to are the same and are now in force. It follows, therefore, that for the reasons given and elaborated in that case by Chief Justice Stayton the contract in the case under consideration is illegal and unauthorized."

In the Altgelt decision the City of San Antonio, in plain terms, limited the franchise to water drawn from a particular source, but neither counsel nor the Court even ventured to surmise that a contract otherwise violative of the Constitution was saved from judicial condemnation because it did not include every conceivable source of supply from the heavens above, the earth beneath and the waters under the earth.

The City of Austin v. Nalle, 85 Texas, 520 (549), considers a water franchise which, it was claimed, restrained the City of Austin from making a subsequent contract with another water supply concern. Repudiating this contention, the Supreme Court speaks through Justice Gaines, using the following language:

> "It is further alleged that at the time of the passage of the ordinances for the election and the issue of bonds, the city had a contract with a certain company by which it was provided with an adequate supply of light and water, and that that company was still able and willing to carry out its contract and to supply all the light and water which the necessities of the city required. And it is insisted that by such a contract the city had exhausted its power to secure water and light from any other source. It seems to us that the statement of the proposition carried with it is own refutation. In this State no city can grant an exclusive right to furnish either water or light." Brenham v. The Water Company, 67 Texas, 544.

The case of Edwards County v. Jennings, 89 Texas, 618, was one in which a county water franchise was involved, concerning which the courts say:

> "Under the authority of Brenham v. Water Company, 67 Texas, 561, and Constitution, Art. 1, Sec. 26, which provides that 'perpetuties and monopolies are contary to the genius of a free government and shall never be allowed,' we are of the opinion that the agreement of the county to grant to Jennings an exclusive right-of-way to lay piping for supplying the town of Rock Springs, Edwards County, Texas, with water tends to create a monopoly, is violative of the Constitution, illegal and void. As stated above, the consideration for the obligation imposed upon Jennings by said contract consisted of the obligation of the county (1) to pay $3500, and (2) to perform this unlawful agreement. We can not say which of these considerations most affected the mind of Jennings and induced his promise, nor are there any means of ascertaining how much of his obligation was based upon the illegal consideration."

Jones v. Carter, 101 Southwestern, 514, cites Brenham v. Water Company with approval. In that case there was involved claim of exclusive right to the enjoyment of the street, and the right was denied.

Hartford Fire Insurance Company v. Houston, 110 S. W. 973 (977). Considering a water franchise, the court says:

> "The contract was by its terms to last twenty-five years, and it was stipulated that at the end of that time the City of Houston was to have

> the priviledge of purchasing the entire works at their appraised value. If the city did not exercis this priviledge to buy at the end of twenty-five years the contract was to continue until the works were finally purchased by the city, the right inuring to the city to purchase at the end of every five years thereafter, by giving twelve months' notice of such intention. The contract was thus to endure twenty-five years and thereafter without limit unless terminated by the election o fthe city to purchase. That the exclusive priviledge thus given to the water company was a perpetuity and a monopoly in contravention of Sec. 26, Art. 1 of the Constitution and renders the contract void can not be questioned." City of Brenham v. Water Company, 67 Texas, 542.

The Hartford Insurance Company v. Houston, 116 S. W. 36, was a decision of the Supreme Court in the case last referred to. Therein Chief Justice Gaines, affirming the invalidity of water franchise contracts construed to be exclusive and hence violative of the Constitution, says:

> "In so far as it was held by that ruling that the contract was illegal and voind, and in so far as a recovery was sought by the insurance companies by reason of their subrogation to the rights of the city against the water company, we are of the opinion that the action of the court was correct. We could not hold otherwise without overruling the cases of the City of Brenham v. the Water Company, 67 Texas, 542, and Edwards County v. Jennings, 89 Texas, 618, for which no good reason suggests itself to our minds."

These are not the only instances in which the authority of the Brenham case has been depended upon in the interpretation of water contracts, and the adjudication of rights resulting therefrom, but enough has been shown in the way of its fortification, if that were needed, to demonstrate its impregnability.

The Texas courts have never questioned or limited the authority of the Brenham case. On the contrary, they have in every instance when the issues were involved reaffirmed its correctness; and it is noticeable that in the very last expression of the Supreme Court (the Houston case), that honorable tribunal distinctly refused to overrule it, and even takes occasion, when urged to overrule it, to say that "no good reason suggests itself for such action."

It would be a work of super-erogation to assert the substantial identity of the contract in the Brenham case and the present case after exhibiting to the Court as we have done in parallel columns the exact terms of the two contracts. The Ennis contract probably was not copied from the decision in the Brenham case. It seems inconceivable that such should have been done. This improbability is strongly emphasized when it is remarked that the similarity which appears between those portions of the contract quoted in the Brenham decision with the corresponding parallels in the Ennis contract is not more marked than the similarity which appears between the sections of the Brenham contract not quoted in the decision with the corresponding sections in the Ennis contract. This circumstance shows that the opinion in the Brenham case was not the document before the author of

the Ennis contract. It is almost certain, however, that both contracts were prepared from a common original.

The culmination of the judicial consideration of water contracts is the opinion of the Supreme Court of Texas in the instant case, wherein express approval is given to all the principles of the Brenham case and disapproval is expressed of criticisms leveled against the Brenham case by plaintiff in error in this cause. We refrain from reproducing that opinion in this brief, for the reason that it is copied in full in the record, at pages 60-65 of the transcript.

This court in many cases has expressed its attitude toward such a situation as is here presented. It has frequently said that in such cases it would follow the law of the state as it existed when the contract was made, and would take the same view of local constitutions, statutes, municipal charters and municipal ordinances that had been taken of such matters by the state courts when the franchise was granted was granted. This, for the obvious reason that the law of the State is a part of the contract. A contract means what the law of the state say it means whether that interpretation would or would not be given it by the theoretical philologist

Gulf & Ship Island Railroad Co. v. Hewes, 183 U. S., 68.

The Supreme Court of Mississippi in 1878 decided principles of law relating to the power of the Legislature to grant charters containing exemptions from taxation. Later, in 1882, the Legislature granted a charter incorporating the Gulf & Ship Island Railroad Company. Afterwards, the Railroad Commission of the State of Mississippi, in opposition to the claim of the Railroad Company to exemption from taxation

under its charter, returned its property for taxation and threatened a seizure of same under such process. Wherefore an injunction was prayed and a federal question urged under the contract clause of the Federal Constitution.

The decision turned upon the applicability and controlling effect of the views as to the law of such questions as expressed in the decisions of the Supreme Court of Mississippi anterior to the charter out of which it is claimed the exemption arises. This Court through Mr. Justice Brown say:

> "As it is not altogether clear from the language of these sections whether it was competent for the legislature to grant to a railroad company an exemption from taxation, it is conceded by both sides to this controversy that we are bound to look to the decisions of the supreme court of Mississippi at the time this charter was granted, for their proper interpretation. Douglass v. Pike County, 101 U. S., 677. While the question of contract or no contract in a particular case is one which must be determined by ourselves, every such alleged contract is presumed to have been entered into upon the basis and in contemplation of the existing Constitution and statutes, and upon the established construction theretofore put upon them by the highest judicial authority of the state."

Freeport Water Company v. City of Freeport, 180 U. S., 587.

In 1882 the City of Freeport granted a water franchise in which rates of service were prescribed. It was accepted and complied with by the grantee and his assigns. Afterwards the City of Freeport by ordinances reduced the rates stipulated in the original franchise and refused to pay higher rates. The

Water Company thereupon sued for the sums claimed to be due upon the basis of rates fixed in the original ordinance, and when the later ordinance reducing rates was pleaded, challenged the legality of such later ordinances upon the ground that it impaired the obligation of the contract based upon the original ordinances. Before the present controvrsy arose the Supreme Court of Illinois in other litigation declared rules of law which if followed in the Freeport litigation were decisive of the questions at issue. The Supreme Court of the United States speaking through Mr. Justice McKenna, and referring to the decision of the Illinois Supreme Court, say:

> "It is true that we do not necessarily have to follow this decision. When Section 10, Article 1, is invoked we decide for ourselves the fact of contract,—not only its formal execution, but its legal basis in law, and therefore construe for ourselves the statutes of the state upon which it is claimed to rest. In such case, we have also said, we are disposed to incline to agreement with the state court. These principles hardly need the citation of cases. They have become elementary. We may quote, however, the language of Mr. Justice Bradley in Burgess v. Seligman, 107 U. S. 20, 27 L. ed. 359, 2 Sup. Ct. Rep. 10. After stating the peculiarity of the existence of two coordinate jurisdictions in the same territory, and the necessity for the exercise of mutual respect and deference to avoid anomalous and inconvenient results, and yet asserting the necessity in the Federal courts of the right to exercise an independent judgment, the learned Justice said:
>
> "Since the ordinary administration of the law is carried on by the state courts, it necessarily happens that by

the course of their decisions certain rules are established which become rules of property and action in the state and have all the effect of law, and which it would be wrong to disturb. This is especially true with regard to the law of real estate and the construction of state constitutions and statutes. Such established rules are always regarded by the Federal courts, no less than by the state courts themselves, as authoritative declarations of what the law is. But where the law has not been thus settled, it is the right and duty of the Federal courts to exercise their own judgment; as they always do in reference to the doctrines of commercial law and general jurisprudence. So, when contracts and transactions have been entered into, and rights have accrued thereon under a particular state of the decisions, or when there has been no decision of the state tribunals, the Federal courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the state courts after such rights have accrued. But even in such cases, for the sake of harmony and to avoid confusion, the Federal courts will lean towords an agreement of views with the state courts if the question seems to them balanced with doubt. Acting on these principles, founded as they are on comity and good sense, the courts of the United States, without sacrificing their own dignity as independent tribunals, endeavor to avoid, and in most cases do avoid, any unseemly conflict with the well-considered decisions of the state courts.'

Applying these principles to the case at bar, we solve its questions. The supreme court of the state in passing on the case, not only considered the acts of the 9th and 10th of April, 172, regarding municipalities, but also, as we have said, the general incorporation act of April 18, 1872. Under the latter the plaintiff was incorporated, and

it was held that the act 'must be regarded as entering into and forming part of the charter' of the plaintiff. The statute reserves to the general assembly the power to prescribe the government of corporations 'such regulations and provisions as it may deem advisable.' The language is very comprehensive. Regarding it alone, it is difficult to conceive what objects of legislation are not covered by it. The Supreme court of the state has construed it to be of greater import than the usual reservation of the power to alter and amend the charters of corporations."

Warburton v. White, 176 U. S., 484.

Jurisdiction invoked under the contracts clause of the Constitution upon the theory that changes in the laws of the state of Washington putting in force the community system of property holdings of husband and wife impaired certain contracts of purchase.

The court, through Mr. Justice White, say:

"The argument of the plaintiff in error comes to this:—that although the statutes of the territory of Washington, which were continued in force within the state on the organization of the state government, have been construed by the state court contrary to the view now urged upon this court, nevertheless this court should disregard such judicial construction and treat the statutes as conferring rights which the highest tribunal of the state has held never arose from them. It is claimed that where a contract is asserted to have been impaired by a subsequent statute it is the duty of this court to determine for itself the nature and extent of the contract, where the subsequent legislation has been by the decision of the court held operative upon or enforced against the alleged con-

tract rights. The doctrine is elementary, but the principle which it embodies is subject to a well-settled qualification, which is, that where it is asserted that a contract has been entered into on the faith of the state laws, existing at the time when it was made, the construction of such laws, which was settled at the time of the making of the contract, by the court of last resort of the state, will be adopted and applied by this court in considering the nature of the contract right relied upon. This rule, however, it is argued, is not applicable in this case, because it is said that all the decisions of the supreme court of Washington referred to were announced since the contract of purchase by the husband was made, and therefore the interpretation, which these decisions expound, cannot be considered as having entered into and formed a part of the contract, since they were not in existence when the contract was made. From this it is argued that the decisions in question do not, therefore, relieve this court of the duty of interpreting for itself, as a matter of first impression, the laws of the territory or of the state of Washington which are here involved, and upon the faith of which, it is asserted, the obligations arising from the contract took being.

While, abstractly considered, the proposition is conceded, it is not apposite to the controversy here presented. The rule is subject to a limitation which is, that where state decisions have interpreted state laws governing real property or controlling relations which are essentially of a domestic and state nature, in other words, where the state decisions establish a rule of property, this court when called upon to interpret the state law will, if it is possible to do so, in the discharge of its duty, adopt and follow the settled rule of construction affixed by the state court of last resort to the statutes of the state, and thus conform

to the rule of property within the state. It is undoubted that this rule obtains, even although the decisions of the state court, from which the rule of property arises, may have been for the first time announced subsequent to the period when a particular contract was entered into. Burgess v. Seligman, 107 U. S. 20, Miller v. Ammon, 145 U. S., 423."

Hartford Fire Insurance Co. v. Chicago, Milwaukee & St. Paul Ry. Co., 175 U. S. 91.

"Questions of public policy as affecting the liability for acts done, or upon contracts made and to be performed, within one of the states of the Union,—when not controlled by the Constitution, laws, or treaties of the United States, or by the principles of the commercial or mercantile law or of general jurisprudence, of national or universal application,—are governed by the law of the state as expressed in its own Constitution and statutes, or declared by its highest court."

Elmendorf v. Taylor, 10 Wheat. 152, 159;
Bank of Augusta v. Earle, 13 Pet. 519, 594;
Vidal v. Philadelphia, 2 How., 127, 197;
Bucher v. Cheshire R. Co. 125 U. S. 555, 581, 584;
Detroit v. Osborne, 135 U. S., 492, 498, 499;
Union Nat. Bank v. Bank of Kansas City, 136 U. S., 223, 235;
Etheridge v. Sperry, 139 U. S., 266, 276, 277;
Gardner v. Michigan C. R. Co., 150 U. S., 349, 357;
Bamberger v. Schoolfield, 160 U. S., 149, 357;
Missouri, K. & T. Trust Co. v. Krumseig, 172 U. S., 351;
Sioux City Terminal R. & Warehouse Co. v. Trust Co., of N. A., 173 U. S., 99;
Wade v. Travis County, 174 U. S., 499.

In determining what the laws of the several states are which would be regarded as rules of decision, we are bound to look not only to their Constitution and statutes, but as to the decisions of the highest courts giving construction to them."

Old Colony Co. vs. City of Omaha 230 U. S. 100.

The Old Colony Co. brought bill in equity as trustee in a mortgage of a public service corporation to enjoin the city of Omaha from interfering with its franchise. The principle question involved was whether the public service company had a subsisting franchise, and if so, its construction. The franchise rested primarily upon an ordinance adopted by the city council of Omaha in 1884.

The record disclosed various provisions of the charter of the city of Omaha in force at the time of the franchise ordinance, and it also was made to appear that in several decisions the Supreme court of Nebraska had placed a construction upon the charters of cities similar to the city of Omaha, and their powers with respect to granting franchises thereunder. If the decisions referred to were followed the questions at issue were not debatable, it appearing that the State decisions had frequently settled them. It was contended however, that the decisions were wrong and that it was the duty of this court to decide for itself the questions involved, and that when this court undertook such an independent determination it might go contrary to the decisions of the state courts. The contention of counsel and this court's disapproval of the contention, is expressed in the following quotation:

> "To the state decisions here cited counsel for the city interposed the objection that they are not well grounded in the syllabus. We need not say more of the first branch

of objections that that if the decisions relate to matters of local law, namely, the construction of the state constitution and statutes, and the powers of municipal corporation, they must be regarded by us as controlling when their application involves no infraction of any right granted or secured by the Constitution of the United States."

Griffin vs. State of Conn., 218 U. S. 563.

"The contract clause of the constitution of the United States does not give validity to contracts which are properly prohibited by statute."

While the Griffin case deals primarily with contracts prohibited by statute, such contracts are no more without the pale of protection by the federal constitution than are contracts which are prohibited by decisions of the highest courts o fthe State. There are many principles of law not embodied in statutory form which are not less binding upon the people because not so clothed.

The volume of common law adjudication of principles of contract with relation to illegality, public policy and the like, is much greater than the statute law on such matters. Every student realizes that such principles embodied in the decisions of courts must be taken into consideration just as certainly as principles embodied is statutory law.

Under the Texas laws, as construed, interpreted and applied by the decisions of the Supreme Court of Texas, the contract presented by this record to this court was prohibited by statute law, therefore not entitled to protection by the federal courts.

Taylor v. Ypsilanti, 105 U. S. 60-73, 26 L. ed. 1012. The Court held:

> "All along through the reports of our decisions are to be found adjudicaions in which, upon the fullest consideration, it has been held to be the duty of the Federal Courts, in all cases, within their jurisdiction, depending upon local law, so far as it affects contract obligations and rights, as it was judicially declared to be by the highest court of the state at the time such obligations were incurred or such rights accrued. And this doctrine is no longer open to question in this court. It has been recognized for more than a quarter of a century as an established exception to the general rule that the Federal Courts will accept or adopt the construction which the State Courts give to their own Constitution and laws."

(This is a case where bonds were issued and sold at a time when the decisions of the Supreme Court of the state upheld their validity, and later changed holding the bond issue invalid, but after rights had accrued.)

Louisiana v. Pilsbury, 105 U. S. 278-302, the Court held:

> "The construction, so far as contract obligations incurred under it are concerned, constitutes a part of the law as much as if embodied in it. So far does this doctrine extend that when a statute of the two States, expressed in the same terms, is construed differently by their highest courts, they are treated by us as different laws, each embodying peculiar construction of its own State and enforced in accordance with it in all cases arising under it. Christy v. Pridgeon, 4 Wall. 197, 18 L. ed. 382; and Shelby v. Guy, 11 Wheat. 367. The statute as thus expounded determines the validity of all contracts under it. A subsequent change in its interpretation can affect only

subsequent contracts. The doctrine on this subject is aptly and forcibly stated by Chief Justice in the recent case of Douglass v. Pike, 101 U. S. 686, 25 L. ed. 971. 'The true rule,' he observes, 'is to give a change of judicial construction in respect to a statute the same effect in its operation on contracts and existing contracts rights that would be given to a legislative amendment; that is to say, make it prospective, not retroactive. After a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself, and a change of decision is, to all intents and purposes, the same in its effect on contracts as an amendment of the law by means of a legislative enactment.' Gelpcke v. Dubuque, 1 Wall. 175, 17 L. ed. 520; Havemeyer v. Iowa Co., 3 Wall., 294, 18 L. ed. 38; Thompson v. Lee Co. 3 Wall., 327, 18 L. ed. 177; Lee County v. Rogers, 7 Wall. 181, 19 L. ed. 160; Chicago v. Sheldon, 9 Wall. 50, 19 L. ed. 594; Olcott v. Supervisors, 16 Wall. 678, 21 L. ed. 382; Fairfield v. Gallatin Co., 100 U. S. 47, 25 L. ed. 544."

Fairfield v. Gallatin Co., 100 U. S. 47-55.

Gallatin Co. had duly authorized a subscription to a railroad, but before the subscription was given, the legislature passed a law, in effect, enacting "No County, etc. shall ever become a subscriber to the capital stock of any railroad, etc., provided however, the adoption of this article shall not be construed as affecting the rights of any such county, etc., to make such subscriptions where the same have been authorized under the existing laws, etc." The United States Supreme Court in Concord v. Bank had held that although the county had duly authorized the subscription, it could not be made

after the legislative act became effective, and in so deciding the Concord case the U. S. court overlooked a decision of the State Supreme Court holding directly to the contrary. In this case, Fairfield v. Gallatin Co., the U. S. Supreme Court changes its opinion in accordance with the decision of the State Supreme Court, and overruled the Concord case, saying:

> "With much more reason may we change our decision construing a state constitution when no rights have been acquired under it, and when it is made to appear that before the decision was made the highest tribunal of the state had interpreted the construction differently, when the interpretation within the state fixed a rule of property and has never been abandoned. In such a case we think it our duty to follow the state courts, and adopt, as the true construction, that which those courts have declared."

Douglass v. Pike Co., 101 U. S. 667-88. The Court held:

> "After a statute has been settled by judicial construction, the construction becomes, so far as contract rights are concerned, as much a part of the statute as the text itself, and a change of decision is, to all intents and purposes, the same in effect on contracts as an amendment of the law by means of a legislative enactment."

Commercial Bank v. Buckingham, 5 How. 317. The Court held:

> "Undoubtedly contracts are liable to be impaired by the errors of the judiciary. It is not for such errors that resort can be had to this court from State tribunals. If a contract be impaired by the application, on the part of the court, of some legal principle, or by misconstruction

of the terms of the contract, a case does not arise for the jurisdiction of this court; but if the contract is impaired by the application of a state law, then the jurisdiction does attach."

Scott v. Jones, 5 How. 330-341. The Court held:

It is the peculiar province and priviledge of the State courts to construe their own statutes; and it is no part of the functions of this court to review their decisions, or assume jurisdiction over them on the pretense that their judgments have impaired the obligations of contracts. The power delegated to us is for the restraint of unconstitutional legislation by the States, and not for the correction of alleged errors committed by the judiciary.

Green v. Lessee, 6 Peters, 291, 297. The Court held.

"On all questions arising under the Constitution and laws of the Union, this court may exercise a revising power; and its decisions are final and obligatory on all other judicial tribunals, State as well as federal. A State tribunal has a right to examine any such questions and to determine them, but its decision must conform to that of the Supreme Court, or the corrective power may be exercised. But the case is very different where a question arises under a local law. The decision of this question, by the highest judicial tribunal of a State, should be considered as final by this court; not because the State tribunal, in such a case, has any power to bind this court; but because, in the language of the court in the case of Shelby v. Guy, (11 Wheat. 361), 'a fixed and received construction by a State in its own court, makes a part of the statute law.' * * * * * * * * *

"Would not a change in the construction of a law of the United States by this tribunal be obligatory on the

State courts? The statute, as last expounded, would be the law of the Union; and why may not the same effect be given to the last exposition of a local law by the State Court? The exposition forms a part of the local law, and is binding on all the people of the State and its inferior judicial tribunals. It is emphatically the law of the State; which the federal court, while sitting within the State, and this court, when a case is brought before them, are called to enforce. If the rule as settled should prove inconvenient or injurious to the public interests, the Legislature of the State may modify the law or repeal it.

"If the construction of the highest judicial tribunal of a State form a part of its statute law as much as an enactment by the Legislature, how can this court make a distinction between them? There could be no hesitation in so modifying our decisions as to conform to any legislative alteration in a statute; and why should not the same rule apply, where the judicial branch of the State government, in the exercise of its acknowledged functions, should by construction, give a different effect to a statute from what had at first been given to it. The charge of inconsistency might be made with more force and propriety against the federal tribunals for a disregard of this rule, than by conforming to it. They profess to be bound by the local law; and yet they reject the exposition of that law, which forms a part of it. It is no answer to this objection that a different exposition was formerly given to the act which was adopted by the federal court. The inquiry is, what is the settled law of the State at the time the decision is made? This constitutes the rue of property within the State, by which the rights of litigant parties must be determined.

"As the federal tribunals profess to be governed by this rule, they can never act inconsistently by enforcing

it. If they change their decision, it is because the rule on which that decision was founded has been changed.

"The case under consideration illustrates the propriety and necessity of this rule. It is now the settled law of Tennessee that an adverse possession of seven years under a deed for land that has been granted, will give a valid title. But, by the decision of this court, such a possession, under such evidence of right, will not give a valid title. In addition to the above requisites, this court have decided that the tenant must connect his deed with a grant. It therefore follows that the occupant whose title is protected under the statutes, before a State tribunal, is unprotected by them before the federal court. The plaintiff in ejectment, after being defeated in his action before a State court, on the above construction, to insure success has only to bring an action in the federal court. This may be easily done by a change of his residence, or a *bona fide* conveyance of the land.

* * * * * * * *

"In the case of Murray's Lessee v. Baker, et al. (3 Wheaton 540) this court decided, that the expressions 'beyond seas' and 'out o fthe State' are analogous; and are to have the same construction. But, suppose the same question should be brought before this court from a State where the construction of the same words had been long settled to mean literally beyond seas, would not this court conform to it? And might not the same arguments be used in such a case as are now urged against conforming to the local construction of the law of Tennessee. Apparent inconsistencies in the construction of the statute laws of the State may be expected to arise from the organization of our judicial systems; but an adherence by the federal courts to the exposition of the local law, as given by the courts of the State, will greatly tend to preserve

harmony in the exercise of the judicial power in the State and federal tribunals. This rule is not only recommended by strong considerations of propriety, growing out of our system of jurisprudence, but it is sustained by principle and authority."

Murray v. Pocatello, 226 U. S. 318.

In this case there arose a controversy between the city of Pocatello and one Murry, who held a water franchise under the city, concerning the application of an ordinance of June 6, 19101, giving a basis for fixing water rates which was contrary to a subsequent statute of the State. The Constitution of the State contained certain provisions deemed important and the courts of the State had construed the constitution and statutes. Disposing of this controversy this court said:

"We are not prepared to overrule the construction of the legislative power as continuing and irrevocable adopted by the Supreme Court of the State."

Hill vs. Atlantic & N. C. R. R. Co., 143 N. C. 539.

The Supreme Court of North Carolina was required to consider and construe the validity and meaning of a lease executed between the Atlantic & N. C. R. R. Co., and the Howland Improvement Co., whose name was afterwards changed to Atlantic & N. C. R. R. Co. The action having been brought to annul the lase on several grounds, among others that the lessor company had no power to make the lease, it became important to determine the meaning of a phrase in the charter granted by the legislature of North Carolina to the N. C. R. R. Co. giving it the right and power to transport passengers and freight and to "farm out" the right of transportation.

The courts of the state in earlier adjudications had defined the meaning of the words "farm out" in similar charters, but it was urged that the former decisions were wrong and should not be followed. This contention brought up the question whether definitions and interpretations of language in contracts as embodied in the decisions of courts, when later contracts using those terms were made, entered into and furnished the controlling guide for the interpretation of the later contracts. The Court said:

> "It is utterly impossible to escape the conclusion that the question of *ultra vires* now raised in behalf of plaintiff's has been decisively answered by this court against their present contention more than thirty-four years ago, in the case of State vs. Richmond, 72 N. C. 634, and afterwards on a reconsideration of the whole matter, and a review of that decision, it was solemnly adjudicated by the court in State vs. Richmond, 73 N. C. 527, 21 Am. Rep. 473, that such a lease, purporting to have been made under a power given in words identical with those used in the charter of the Atlantic & North Carolina Railroad Co., was not only authorized by those words and valid in that respect, but was not *ultra vires*. It is therefore entirely too late under the circumstances, and in view of these precedents, for the plaintiffs to again raise the question as to the true meaning of the words "farm out," or to question the validity of the lease upon the ground that it is *ultra vires*.
>
> * * * * * * * *
>
> "When a judicial interpretation has once been put upon a clause, expressed in a vague manner by the legislature, and different to be understood, that ought of itself to be a sufficient authority for adopting the same construction.
>
> * * * * * * * *

"An excellent statement of the doctrine of *stare decisis* will be found in Black's Interpretation of Laws, pp. 375 et seq., where it is substantially said that an authoritative judicial construction put upon a statute has the force of law by becoming, as it were a part of the statute itself.

The foregoing authority cites and discusses a great many important decisions from this State, the English courts of last resort, and many of the courts of the States of the American Union.

IV.

PROPOSITION.

Should this court be of opinion that the law of the State of Texas in force at the time of the making of the contract here involved, was not necessarily the law of the contract, and that this court, notwithstanding the principles were settled under the local law, will decide for itself, this court nevertheless will lean in every case of doubtful construction to a position in accord with the State law.

DISCUSSION.

"Any reasonable doubt will be resolved in favor of that contruction of the State Statutes which has been adopted by the courts of last resort in that State."

Yazoo R. R. v. Adams, 181 U. S. 580;
New Orleans v. La., 179 U. S. 622.

Acting on these principles, founded as they are on commity and good sense, the courts of the United States without sacrificing their own dignity as independent tribunals, endeavor to avoid and in most cases do avoid, any unseemly conflict with well considered decisions of the State courts.

Burgess v. Seligman, 107 U. S. 20;
Pleasant Twp. v. Aetna Life Ins. Co. 138 U. S. 67.

In all cases it is the duty of the Fedral Court to lean to an agreement with the State court where the issue relates to matters depending upon the construction of the constitution or the laws of the State.

Great So. Hotel Co. v. Jones, 193 U. S. 532;

Mead vs. Portland, 200 U. S. Rep. 148.

The Supreme Court of Oregon had sustained an order of the lower court dismissing a complaint in a suit to enjoin municipal authority from closing a passageway in the approach of a bridge. The contract clause of th Federal Constitution was properly invoked in the State court, and after the decision of the cause there writ of error was applied for and obtained to this court upon the basis of the federal question urged.

The rights of plaintiff originally in the street arose under ordinances of the City of Portland and the Supreme Court of Oregon had decided what powers the City of Portland had to grant rights in its streets, as it had attempted to do in the franchise granted to plaintiffs, and interpreting the ordinances upon which plaintiffs relied, that court had decided that plaintiffs had no rights in the street different in kind or extent from that enjoyed by the public.

It was urged however, upon this court, that notwithstanding the views as expressed by the Supreme Court of Oregon, this court should adopt a contrary view, to which this court replied:

> "Against these conclusions plaintiffs cite other Oregon cases. We are, however, not called upon to reconcile the cases. Plaintiffs point to no case decided prior to the

construction of the wharves which interprets the ordinance as they now contend for, which might bring the case within the ruling of Muhlker v. New York & H. R. Co. 197 U. S. 554 and Lewis v. Portland, 25 Oregon 159. And if we could say that the construction of the ordinances by the supreme court is not indisputable yet we are required by the rule expressed in Burgess v. Seligman, 107 U. S. 20, and the many cases which have followed it, to incline to an agreement with the state court." * * * *

"The act of 1878 is a local statute, and in its interpretation involves no federal question, nor does it become such by the circumstances of this case. It expresses the legislative authority and its interpretation by the supreme court of the State we must accept."

V.

PROPOSITION.

Where the status, as it existed at the time of the making of an illegal grant of a franchise by a municipal corporation has not been substantially changed through a good faith reliance upon the validity of the grant, every consideration of comity justifies this court in following the State laws as they have been uniformly interpreted and construed.

DISCUSSION.

The distribution system now owned by plaintiff in error in the city of Ennis, was not constructed under the franchise here in litigation. The pleadings of the plaintiff in error in the state court show that such distribution system was built long prior to the granting of the present franchise by another corporation, the Ennis Ice, Light & Water Co., and under an earlier franchise. (Tr. of Rec. p. 16).

Morrison, the grantee in the present franchise, had acquired the old distribution system before obtaining the present franchise, and after obtaining the present franchise he organized the present plaintiff in error into a corporation under the laws of Texas and transferred to it the old distribution system and the new franchise. (Tr. of Rec. pp. 16-17).

Prior to March, 1900, and at all times since, the city of Ennis owned the two large reservoir sites from which the city supply was being taken, and about eight thousand feet of water mains connecting the new lake with the distribution system then owned by Morrison, the original grantee in the present franchise, and now owned by plaintiff in error. (Tr. p. 25). The only outlay for work shown to have been done pursuant to the new franchise was the placing of some pumping machinery at the city lakes. Under the illegal grant he sold water in the city of Ennis for nearly ten years before his service became insupportably poor.

No injustice will be done plaintiff in error by holding it to the rules of law as announced by the courts at the time it obtained the franchise in question from the city of Ennis. Theoretically no such injustice would be presented in any case for no presumption is stronger than that which imputes knowledge of the laws of a state to a person residing and making contracts therein. But the propriety of applying the rule in this case is made all the clearer when it is shown that no substatial legal injury would follow the application of the rule. There has been no large outlay so far as the record shows, in reliance upon the grant. The case is not a hard case. The distribution system, the reservoirs, the mains from the reservoirs, all antedate the birth of the grant in question. Be-

yond the pumps used in putting the water into the mains, (which doubtless was a small sum, as no emphasis is put upon it in the present record, and naturally only a small outfit would be required to pump into the main water to supply a small city like that in question), practically nothing is shown to have been spent, and upon the strngth of that development the plaintiff in error has already had nearly ten years tenure under the illegal grant. No doubt it has received many times over the cost of the pumping plant in the way of net earnings. At all events the record shows no equitable basis for relieving plaintiff in error from the application of the ordinary rules of law pertaining to the construction of contracts, and no basis is laid for any extraordinary appeal to this court to raise up any principle in aid of the illegal contract.

The defendant in error does not make the suggestions here set forth, with the idea that there could arise any estoppel against the city of Ennis under any circumstances which would validate an unconstitutional contract, but where the equities are either very light or do not exist at all, no reason appears for according to a complaining party in this court any extraordinary liberality.

Independent of all authority, and regarding the contract in question from a standpoint quite unembarrassed by any precedent, we submit that the contract is obviously illegal. It trangresses important rules of public policy, and when analytically studied carries with it every inference of exclusiveness and legal monopoly. The process of reasoning which carries the mind to this conclusion is set out in the Brenham case much too elaborately to be reproduced here, and with a force of logic and carfullness of statement we could not hope to rival.

From the standpoint of precdent our position is impregnable: the Brenham case, the line of Texas decisions supporting its principal positions, all crowned by the last expression of the views of the Supreme Court of Texas as embodied in the opinion in the present case. There has been not a discordant note during the last twenty-five years, during which period the entire judicial expression as to exclusive municipal franchises has found voice.

Opposed is the opinion in the case of Bartholomew vs. City of Austin, 85 Fed. 359, and a statement of the judge rendering the opinion in the case of Cunningham vs. City of Cleveland, 98 Fed. 657, stating that even if the case he were then deciding were not distinguishable from the Brenham case he would not follow that case.

Referring to the Bartholomew case the opinion of the Supreme Court in this case declares,

> "It is significant that in the only case where a contrary doctrine to that of the Brenham case has been declared, no analysis of the contract has benn made in the opinion and no substantial ground given why the language of the contract does not import the existence of an exclusive grant of rights and priviledges. The statement unsupported by reason, is made that there is nothing in the contract to prevent the City of Austin from granting the right to others to lay mains and pipes in the streets and alleys of the city for the purpose of selling wtaer to its citizens. This is true of the other cases to which reference has been made, in the able and exhaustive brief of plaintiff in error's learned counsel and in the cases referred to in the opinion of Judge Pardee, except the three cases of the City of Brenham, the City of Austin and the City of

Ennis. These three cases are distinguishable from all the other cases in the fact that in addition to the grant to lay pipes and mains in all streets and alleys of the city for the purpose of furnishing water to the city and its inhabitants, which does not deny the authority to grant a similar right to other citizens, it grants for the specified period the right and priviledge to supply the city and its inhabitants with water for domestic and other uses and for the purpose of extinguishing and preventing fires.

"This latter clause is the distinguishing feature of the three cases named from all the other cases to which citation has been made."

And again that court said:

"It is urged that this court should overrule the Brenham case, and we are admonished that the courts of the United States will not follow the ruling of this court if the Brenham case is held to be the rule of construction as to the case at bar and are referred to the Bartholomew case. The contract in that case, it is true, was very similar to that in the Brenham case and in the case at bar, and while the Circuit Court of Appeals refused to follow the Brenham case, such refusal was based upon the fact that the contract with the City of Austin by Bartholomew had been in force for five years and bonds had been issued and floated, secured by a lien of the water works before the decision in the Brenham case had appeared. The position there assumed by Judge Pardee is not without great force and does not in the slightest degree indicate a want of due regard for the rulings of this court upon questions of local state policy and state constitutional construction. The same reasoning, however, for not following the Brenham case in the Bartholomew case does not exist here, for when the city of Ennis contract was entered

into the rule in the Brenham case as heretofore stated had existed for a period of thirteen years and was at that time well known to the bar of Texas.

The appellant has been unable to find any Texas decisions supporting its position in this case. It has gone far afield to find foreign case law and, notwithstanding the evident zeal displayed in this foray it is remarkable how little appears in the books opposed to the principles applied by the trial court in its decision of this case.

A few general distinctions invalidate almost every authority cited by the appellant.

As to one group of decisions it appears that in some jurisdictions the local constitutions are held to permit and not to prohibit exclusive franchises. In those jurisdictions, therefore, although a contract may be construed to confer exclusive rights upon the grantee, it is not on that account in violation of fundamental law.

Another group turn upon the question whether, assuming constitutional warrant, the Legislature has in fact conferred upon the municipalities the power to make particular contracts. An exclusive or long term franchises are in derogation of common right, many decisions hold that cities, even where the constitutions do not forbid, may not grant exclusive franchise unless the Legislautre has clearly delegated to the city such power. This group of cases, instead of being in opposition to the contention of this appellee, in fact in part sustain its position; for in the Brenham case it was established and in this case we contend that the Legislature did never in fact attempt to confer upon the City of Ennis the power to make the contract in question here.

In still another group of cases the contracts involved in terms provide that the rights granted are not exclusive, or in terms provide that they are partially exclusive, or in terms limit the exclusiveness to particular fractional portions of the entire supply; and these cases turn largely upon the language of the particular franchises involved. It will be found that none of these contracts parallel the Ennis contract in its emontrolling features, except in one instance.

In the light of these general distinctions the appellee will briefly discuss the authorities cited by the appellant.

Walla-Walla vs. Walla-Walla Water Co., 172 U. S. 1.

In this decision there was involved no question of constitutional law, and the franchise by its terms was expressly declared to be not exclusive. The city had agreed not to establish and operate a competitive water system. It reserved the right to purchase the water supply system of the private water company. The only question involved was whether the city should be required in good faith to comply with its engagements not to construct a competitive system, and, there being no constitutional or statutory obstacles and no countervailing pubile policy involved, the court upheld the particular agreement in question. It expressly declined to criticise the Brenham case, evidently finding nothing in the Brenham case conflicting with the case before it.

Long Island Water Supply Co. v. Brooklyn, 166 U. S. 685.

This decision simply affirmed a prior decision of the Court of Appeals of the State of New York construing the franchise

in question and holding that neither the statute under which the company was organized, nor the contract, nor the act of annexation gave to the company rights exclusive and beyond the reach of legislative action. The contract in terms contained no words of exclusion. It gave to the company priviledge of laying its mains in the streets of the town and contains a covenant on the part of the town to pay certain hydrant rentals.

On consulting the decision of this case in the New York Court of Appeals an outline of its franchises is seen, from which it could not even be insisted with any degree of candor that the rights of the company were in any sense exclusive. The real question involved in that litigation was the right of the city to condemn the franchises of the water company, and the question whether its franchises were exclusive or otheriwse had a bearing only upon the price that should be allowed in the condemnation. The State courts and the National court were agreed that there was nothing in the franchises that indicated that they were intended to be exclusive. Moreover, in that litigation there was involved no question of constitutional law and no question of municipal charter power.

Water Co. vs. Hutchison, 207 U. S. 385.

The franchise involved in this case was in terms and confessedly exclusive and there was involved no matter of franchise construction. The charter power alone was questioned. It appeared that at one time the relevant statute had conferred upon the city of Hutchinson expressly the power to grant exclusive franchises. The statute was amended and the

terms of exclusiveness eliminated therefrom. The statute, among other things, conferred upon the city, "the priviledge of furnishing light." It was urged that this language conferred the power, in spite of the history of the legislation referred to above, to grant an exclusive franchise. This contention the court denied, asserting that such language did not confer "necessarily a grant of power to make it exclusive."

Stein vs. Bienville Water Supply Co., 141 U. S. 67.

In this case the complaint's franchise gave him the *exclusive right* to take water from Three Mile Creek and conduct water from that source to the City of Mobile, but did not purport to deal in anywise with water taken from any other source. The creek in question proved to be inadequate, and thereupon the City of Mobile granted to the defendant, Bienville Water Supply Company, the *exclusive right* of taking water from any other source than Three Mile Creek and distributing that water in Mobile. The complainant, having the exclusive water right in Three Mile Creek, sought to enjoin the defendant from furnishing water taken from other sources of supply. Very naturally the injunction was refused. There was involved no question of constitutional law, no question of municipal charter power, no question of construction of the franchises. Each was exclusive in its particular domain, but the later grant was not in anywise in conflict with the earlier grant. The Alabama Constitution would have permitted an exclusive franchise of the entire business of supplying water from every source of the city had seen fit to grant such a franchise.

Hamilton Gas Co. vs. Hamilton City, 146 U. S. 258.

The City of Hamilton granted a franchise, in terms exclusive of laying pipe for carrying gas in said city. After the franchise was granted, written contracts between the city and the gas company were made from time to time for gas supply. At the termination of one of these contracts, the city, by resolution reciting the facts, declared that it would no longer contract for lighting, but would construct its own supply system. Thereupon the gas company sought to enjoin the city from erecting the municipal supply system. The relief ought was denied because, first, the proposed action of the city in nowise impaired the franchise of the gas company, which allowed it simply the use of the streets for its gas mains and did not obligate the city to take gas from it nor forbid the city the right to contruct a competitive system; second, the Constitution of Ohio in force when the grant was made declared that "no special priviledge or immunities shall ever be granted that might not be altered, revoked or repealed by the general assembly" * * * "that the general assembly shall pass no special act conferring a corporate power," and that "corporations may be formed under the general law, but such law may from time to time be altered or repealed," hence its franchise were subject to the limiting effect of a statute of Ohio passed subsequent to complainant's franchise authorizing the city to construct a municipal supply system.

It is seen this case has no bearing upon the present litigation. It is further seen that its holdings did not aid in interpreting or enforcing the alleged rights claimed by the appellant in this appeal.

City of Vicksburg vs. Vicksburg Water Co., 202 U. S. 553.

This decision considers a water supply franchise which, it was contended, was exclusive and the obligation, of which was said to be impaired by steps taken on behalf of the city to construct a competitive system. The franchise provided for exclusiveness in express terms. It was held:

1st. That the contract was exclusive.

2nd. That the city by implication had agreed not to establish a competitive system.

3rd. That the Constitution of Mississippi allowed such franchises.

It could hardly be contended in good faith that this decision would influence the Texas courts to uphold a similar exclusive franchise when such a franchise is invalidated by the Texas Constitution and such invalidity has been declared unvaryingly through a period of more than twenty years.

Helena Water Works vs. City of Helena, 195 U. S. 383.

In this case was involved a franchise not exclusive and under which neither the city nor its inhabitants were bound to take water supply from the water company. The city undertook to construct a municipal supply system. The water company endeavored to enjoin. Very properly its injunction failed, the court saying: "The priviledge of building other works was, in the absence of some contract forbidding the exercise of the power, clearly within the city's constitutional and statutory rights. We can not find that the city had precluded itself from the exercise of this right by anything in this case." The franchise on the issue of exclusiveness was not open to interpretation because in express terms it provided that no exclusive rights were conferred.

Joplin vs. Light Co., 191 U. S. 150.

The City of Joplin granted the right "to erect and maintain an electric light plant to certain persons for a period of twenty years." Subsequently the city began preparations to build a municipal supply system. The water company sought injunction. The courts say: "The appellee concedes that it has no exclusive right ad yet contends for limitation upon the city which would give it (appellee) a practical monopoly. Others may not seek to compete with it, and if the city can not, the city is left with a useless potentiality, while the appelle exercises and enjoys a practically exclusive right." The limitation contended for upon the power of the city was denied and the injuction refused.

In that case the franchise was admittedly not exclusive. Restrictions upon the municipal powers were claimed to arise entirely from implication. There were involved no constitutional or statutory limitations. There is no point in this decision which aids in the determination of the present litigation.

Atlantic City Water Works vs. Atlantic City, 48 N. J. Law, 378.

This case is quoted upon the proposition only that where cities have statutory authority broad enough to authorize a particular contract and where its grants are unrestrained by contitutional limitation, the courts will not strike down franchises except where they are void for unreasonableness. This decision affirms directly and indirectly three obstacles which must be surmounted by all franchises; first, constitutional limitations; second, want of statutory or charter power in the

municipality; third, want of reasonableness. We have no complaint to make of any of these principles.

Valparaiso vs. Gardner, 49 Am. Rep. 416. No partiular application.

Illinois Trust & Savings Bank vs. Arkansas City, 76 Fed. 271.

Held: That a city of the second class under the laws of the State of Kansas has the power to make contracts for water supply system, but no power to grant exclusive rights in the use of its streets for that purpose. Under this power the city made a franchise grant in terms exclusive. It received water supplied under this illegal grant and refused to pay for same on that account. After discussing the question as to the validity and irrevocability of certain features of the contract, the court, after holding that the suit did not necessarily turn upon the invalid provisions of the contract, determines the real issues in the case, namely, whether the city should pay for the water of which it had already received the benefit. Under settled principles and in conformity with the Brenham case, it compelled the city to pay for such service—a just conclusion supported by sound equitable principles that under such circumstances a city could not accept the benefits of service rendered to it and then refuse to pay.

Oconto Water Co. vs. Oconto, 105 Wis. 76 (80 N. W. 1113).

This case upholds as not being unreasonably long under the laws of Wisconsin a contract for furnishing water to the city for thirty years. The question was considered from

the statutory standpoint and the statutes were construed to be broad enough to permit uch contract. In this respect the Wisconsin statutes are given a different contsruction from the Texas statutes. It was also considered from the taxation standpoint and it was held to be within the taxing power of the State. Such a question is not involved in the present case because our courts hold that such a contract does not create a debt within the meaning of our constitutional limitations. It ws finally considered from the procedure standpoint, the right to maintain the suit in equity being challenged because plaintiff was said to have an adequate remedy at law. With that we are not concerned. The value of this decision in this litigation is much impaired by reason of the vitally different standpoints from which the questions are considered.

Hurley Water Co. v. Vaughn, 91 N. W. 971 (Wis).

There was involved in this decision no question of constitutionality of franchise, but the bare question only as to the unreasonableness of the thirty-year franchise; and upon the authority of the Oconto case the franchise was held to be not unreasonable; the court saying: "True, there is a limit to the exercise of discretionary power by the governing board of a municipal corporation."

Little Falls Co. vs. Little Falls, 102 Fed. 663.

Holds that a thirty years' duration of a water franchise is not so unreasonable as will entitle a municipality to avoid it on that ground *where it involves the erection and maintenance of an expensive plant by the other party.* Holds further

that where water franchises are not exclusive the city may construct a competitive plant. As neither the franchises nor the municipal charter provisions are quoted nor the substance thereof set forth in the decision, it is impossible to determine just what was decided. The opinion was by the trial court for the District of Minnesota.

Cunningham vs. Cleveland, 98 Fed. 657.

This involves a water franchise. The language of the franchise is not given. It is held by the court to be not exclusive. The Brenham case is referred to. It is suggested that it can be distinguished from the Cleveland case, but if not distinguishable the Court will follow the Bartholomew case, to which we will next refer. The discussion of the matters referred to constitute the only pertinent portions of this case.

Bartholomew vs. City of Austin, 85 Fed. 359.

The City of Austin in 1882, before the date of the Brenham decision, granted a water franchise to the city water company of substantially the same tenor as the Brenham case. The construction of the contract came before Judge Pardee, and it was insisted that the Brenham case, which had been meantime decided, was a conclusive precedent to the effect that the contract was exclusive, hence unconstitutional and otherwise invalid. Judge Pardee holds that because the Brenham case had not been decided at the time the Austin franchise was granted he did not feel bound to follow the State Supreme Court in its construction of the franchise. By clear implication the conclusion is deducible

that he would have followed the Brenham case if the Austin contract had been made after the date of the publication of the decision in the Brenham case.

It is deplorable for the State and Federal courts to enforce conflicting rules in the same jurisdictions. In such cases the accidental environment of the litigation determines substantive rights. There arises in every case of impending litigation a race to dissimilar forums. The State courts follow the settled view of local laws; the National courts hold this view in contempt, arousing antagonism and provoking reprisal.

Little good is accomplished by assigning reasons why Judge Pardee should have followed the Brenham case. The casual reading of the decisions in those two precedents disclose which court gave to the interpretation of the contract the more careful consideration. The Brenham case is a landmark. The Bartholomew case, though purporting to interpret and effectuate local constitutions and policies, conflicts with the settled view of law and policy entertained by the tribunals charged primarily with the duty of declaring local law. It is not likely that a Federal court for this circuit would follow the Bartholomew case if a contract like the Brenham contract and made since the report of the decision in the Brenahm case should come before the court.

The cases from 19 New Jersey Equity, 249, and 44 New Jersey, 447, simply declare a general rule of construction, to the effect that where a contract is fairly open to two readings it shall be read so as to be sustained instead of destroyed. The correctness of this is not questioned. Like the other general rules o which we have referred, however, it is not controlling here because not applicable. It is a rule that

applies *only where a document is fairly susceptible of two constructions.* In such cases, if the instrument is given any meaning, the court must choose between the two interpretations and adopt the one consistent with legality, public policy and fairness. This rule, however, is not used to inject a doubt where none existed before. It is not allowed to upset the ordinary effect of language. Where a contract is plain in its meaning, such rules of construction will not be resorted to in order to wrest the language of the contract and make for the parties a new contract. Especially is this true where the courts have already said what the language would mean before the contract is made, or where they have construed words or terms used in the contract. For instance, where the word "insolvent" is used in a contract, a judicial definition of "insolvent" will be used to interpret the word in a judicial review of the contract. Where the term "creditor" is used respecting an unrecorded instrument, that term would be read in the light of the local decisions defining its meaning. These both illustrate the rule and justify us in saying that the law is settled to the effect that where the courts of the forum in which the contract is made have defined the meaning of certain words when they appear in a particular context and with reference to a particular subject matter, such words will be interpreted as having the same meaning when they later appear in a similar context relating to a similar subject matter.

Syracuse Water Co. vs. City of Syracuse, 116 N. Y. 167.

This case holds that certain language quoted in the decision from the city charter did not authoritze the city to grant

an exclusive franchise. It holds further that a franchise authorizing the grantee "when requested" to furnish water to the common council of the city for extinguishment of fires and other purposes upon such terms as may be agreed upon between them, considered in the light of surrounding history, was not a grant of an exclusive right. The case is voluminous and carefully considered but in nowise militates against the contention of this appellee.

Waco Water & Light Co. vs. City of Waco, 27 S. W. 675.

This appears to have nothing to do with the question involved here.

———o———

It may be urged by the appellant that although the franchise granted was exclusive and although its proposed duration was unreasonable, and although it would be held invalid for various reasons if covering the whole matter of a municipal watr supply, yet because it also leased to the grantee the existing lakes of water owned by the city, such specification of a source of supply saved the contract from illegality. In other words, it is contended that the city granted only the right to distribute water from the lakes named, and that the grantee undertook to distribute water from that source only, and that this right could be made in terms exclusive.

If the contract was susceptible of the interpretation that the correlative rights of the city and its grantee were confined to the water in the two city lakes, it would still not follow that even respecting such matters the city could make with such grantee an exclusive, monopolistic and, in a legal

sense, perpetual contract. It would not follow that it could accord to such grantee special priviledges and immunities respecting pubilc property, and public governmental functions, and disable itself from granting similar franchises to others. The decision would be destructive of the whole law against monopolies and perpetuities. If, by limiting the subject matter of the franchise, exclusiveness could be allowed, then an exclusive franchise for a street railway system could be granted on a particular street or streets less than all of the streets in a city; an exclusive franchise could be granted for a water supply to a particular portion or portions of the city less than the entire city: an exclusive franchise could be granted for artesian water upon the theory that it would not exclude another franchise for rain water, surface water, etc.: an exclusive franchise could be granted for gas supply on the theory that it did not forbid another to an electric light concern. By the most trivial subterfuges the whole policy of the law would be upset. The only decision which is claimed to justify such a rule is the Bienville case, 141 U. S. 67. That case does not hold that an exclusive contract even for all of the supply would be bad. Instead it holds that exclusiveness is not in any respect obnoxious to the public policy of Alabama as expressed in the Constitution and laws. No such distinction can be based upon the Bienville case as will support the claim of the appellant here.

We submit, however, that the contract is not to be construed as limiting the correlative rights and duties of the parties to the water contained in the two lakes described in the seventh paragraph of the franchise contract. Nothing appears in the contract to warrant any such restricted inter-

pretation. By the first section, the grantee undertakes *to supply the city with all the water needed for all purposes.* By the second section he acquires the right to operate a most comprehensive system of water supply. By the fourth, fifth and sixth sections the city contracts for a fixed and definite water supply and for an invariable rental for a term of thirty years. The other sections, excepting the seventh section, are of minor importance in the determination of the questions under consideration.

Thus it is seen that so far there is nothing in the contract indicating that the water to be furnished by the franchise grantee is to be only the water contained in the two reservoirs. If the contract was limited to the water in said lakes, the city could refuse to take water from any other sourse of supply. Surely it would not be contended that the city would have the right so to refuse in case Morrison tendered wholesome water from some other sourse of supply.

By the seventh section of the contract, Morrison is given the right to take such water as he may require from the city lakes. This section does not obligate him to take water from that supply. It simply confers an option. His is the right to elect. The very section, moreover, indicates that the supply may prove inadequate for all of the demands that may be made upon the grantee by the city and its inhabitants because it stipulates that he shall not so exhaust the supply as to impair the effectiveness of the earlier contract between the city and the railroad company.

Nothwithstanding these doubts as to the adequacy of the supply present in the minds of both parties at the time the franchise is granted, the contract for a complete supply to

the city is unconditional and not in anywise contingent upon the exhaustion of the then existing supply.

It is true that when the franchise was granted the city was procuring a supply of water from the city lakes. This may be looked to as aiding the rather vague description of the lakes in the franchise contract, and doubtless may be used as a means of identification of the contract existing between the City of Ennis and the railroad company, but it is impossible to conceive how that circumstance is to limit the operation of the franchise to the then visible water supply in the absence of any intimation in the contract that it is intended to bear that construction. The fact that, nothwithstanding such existing supply, the parties should have contracted unconditionally for a complete water supply for thirty years destroyed instead of helped the appeallant's contention on this point.

VI.

CONCLUSION.

In conclusion defendant in error respectfully urges upon this court that the views entertained by the courts of the state as to the powers of its municipal corporations and the validity and interpretation of municipal franchises granted by such bodies allowing the use of local streets through easements relating thereto, are views as to local law just as much as are the views of such courts as to any other character of easement or real property questions; and where the state courts have expressed such views emphatically it is as much persuasive, if not conclusive, upon this court as would be the views of the local courts as to other local property questions or other

views as to the construction and interpretation of local constitutions and statutes.

We accordingly submit this cause praying respectfully that same be in all things affirmed. Should this court however entertain a view different from that entertained by the state courts, then defendant in error prays that the cause be reversed and remanded to the state court in order to afford to defendant in error the opportunity to obtain the ruling of the state courts upon its cross assignments therein filed.

Respectfully submitted,

THOMPSON, KNIGHT, BAKER & HARRIS,

RHODES S. BAKER,

Attorneys for Defendant in Error.

ENNIS WATER WORKS *v.* CITY OF ENNIS.

ERROR TO THE SUPREME COURT OF THE STATE OF TEXAS.

No. 305. Argued May 1, 4, 1914.—Decided May 25, 1914.

Although when the assertion is made that contract rights are impaired it is the duty of this court to determine for itself whether or not there was a valid contract, in considering a contract arising from a state law or a municipal ordinance this court will treat it as though there was embodied in its text the settled rule of law which existed in the State when the action relied upon was taken.

Where the state court based its decision on the ground that there was no original legislative contract to be impaired under a rule of state law which had been so conclusively established as to make the assertion that contract rights were impaired by subsequent legislation

frivolous and unsubstantial, there is no basis afforded for jurisdiction of this court to review the judgment under § 237, Judicial Code. Writ of error to review 105 Texas, 63, dismissed.

THE facts, which involve the jurisdiction of this court under § 237, Judicial Code, are stated in the opinion.

Mr. G. C. Groce, with whom *Mr. Jack Beall* was on the brief, for plaintiff in error:

The franchise ordinance in issue, if properly construed, grants no exclusive rights and creates no monopoly.

A franchise grant should, if practicable, be given a construction which will uphold it, rather than one which would render it illegal.

The City of Ennis had authority to make the contract herein in issue with reference to its own lakes, and the franchise is reasonable in terms.

This court, in determining whether there is a contract, and whether it is being impaired, contrary to the guaranties of the Federal Constitution, acts independently of the state courts.

The ordinances undertaking to annul and repeal the franchise are laws impairing the obligations of a contract.

This court has jurisdiction.

In support of these contentions, see *Altgelt* v. *San Antonio*, 81 Texas, 436; *Atlantic City Water Co.* v. *Consumers Water Co.*, 44 N. J. Eq. 427; *Bartholomew* v. *Austin*, 29 C. C. A. 568; *Caldwell* v. *Water Power Co.*, 44 N. J. Eq. 245; *City of Austin* v. *Nalle*, 85 Texas, 520; *C., B. & Q. Ry. Co.* v. *Nebraska*, 170 U. S. 57; *Brenham* v. *Water Co.*, 67 Texas, 542; *Vicksburg* v. *Water Co.*, 202 U. S. 553; *Walla Walla* v. *Water Co.*, 172 U. S. 1; Const. Texas, Art. I, §§ 23 and 26; *Cunningham* v. *Cleveland*, 39 C. C. A. 211; *Davis & F. Mfg. Co.* v. *Los Angeles*, 189 U. S. 207; *Edwards County* v. *Jennings*, 89 Texas, 621; *Grand Trunk Ry. Co.* v. *South Bend*, 227 U. S. 544; *Hamilton Gas Co.* v. *Hamilton*,

146 U. S. 258; *Hartford Fire Ins. Co.* v. *Houston*, 102 Texas, 317; *Water Works Co.* v. *Helena*, 195 U. S. 583; *Hurley Water Co.* v. *Vaughn*, 91 N. W. Rep. 971; *Ill. Savings Bank* v. *Arkansas City*, 22 C. C. A. 171; *In re Brooklyn*, 143 N. Y. 596; *Joplin* v. *Light Co.*, 119 U. S. 184; *Water Co.* v. *Little Falls*, 102 Fed. Rep. 663; *Long Island Water Co.* v. *Brooklyn*, 166 U. S. 685; *Mahon* v. *Columbus*, 58 Mississippi, 310; *Mayor* v. *Houston St. Ry. Co.*, 83 Texas, 548; *Mercantile Trust Co.* v. *Columbus*, 203 U. S. 311; *Morgan Bros.* v. *M., K. & T. Ry. Co.*, 110 S. W. Rep. 985; *Nor. Pac. Ry. Co.* v. *Minnesota*, 208 U. S. 590; *Water Co.* v. *Oconto*, 105 Wisconsin, 76; Rev. Stat. Texas, 1895, Art. 418; *Id.*, 1911, Art. 865; *State* v. *G., H. & S. A. Ry. Co.*, 100 Texas, 153; *Stearns* v. *Minnesota*, 179 U. S. 223; *Stein* v. *Bienville Water Co.*, 141 U. S. 67; *Gaslight Co.* v. *St. Paul*, 181 U. S. 142; *Water Co.* v. *Syracuse*, 116 N. W. Rep. 167; *Tex. Cent. R. R. Co.* v. *Marrs*, 100 Texas, 530; *Valparaiso* v. *Gardner*, 49 Am. Rep. 416; *Water Co.* v. *Waco*, 27 S. W. Rep. 675; *Water Co.* v. *Hutchinson*, 207 U. S. 385.

Mr. Rhodes S. Baker for defendant in error.

Mr. Chief Justice White delivered the opinion of the court.

In March, 1909, the City of Ennis, Texas, passed an ordinance which purported to be a contract with A. M. Morrison, the owner of a waterworks system in the city, granting to him for the term of thirty years the privilege of supplying water to the city and its inhabitants from certain lakes or reservoirs owned by the city. Morrison accepted the ordinance and assigned his rights to the Ennis Water Works, the plaintiff in error. In April, 1909, the city passed an ordinance declaring that Morrison and the Ennis Water Works had derived no rights from the supposed contract made with them because the ordinance pur-

porting to confer such rights was originally void, and directing suit to be brought "to adjudicate the nullity of said claim of franchise and to regain for the city its rights in the premises." Suit was then brought to have it decreed that the alleged contract with Morrison was void. Pending the suit and before its decision, in March, 1910, for reasons which the record does not disclose, another ordinance in terms like the previous one was adopted by the city which was brought into the case by an amendment to the bill. A judgment in favor of the city was affirmed by the Court of Civil Appeals and by the Supreme Court (105 Texas, 63). This writ of error is prosecuted upon the assumption that the original ordinance was a contract and that the decree below gave effect to the subsequent ordinances thus impairing the obligation of the contract in violation of the Constitution of the United States.

At the outset our jurisdiction is challenged upon three grounds: 1. Because even under the assumption that the city ordinances were the sole authority for bringing the suit, those ordinances did not purport in any way to impair the contract if one existed, but simply directed a legal test to be made and therefore there was no subsequent act of impairment. 2. That even if the ordinances could be treated as impairing the supposed contract, the court below did not decide the case upon any theory that there was power to impair the contract if one existed, but exclusively rested its action upon the independent ground that the original ordinance at the time of its adoption was repugnant to the state constitution and was therefore void. 3. That even if it be the duty of this court to determine for itself whether the state court rightly concluded that there was originally no contract, nevertheless there is no jurisdiction in this case because the court below in deciding that there was originally no contract, based its action upon a rule of state law which had been so conclu-